FORM TO BE SIGNED AND SENT TO LEGISLATIVE DEPARTMENT WHENEVER CHARGE OF OFFICE IS TRANSFERRED.

Certified that I have this day delivered over to for his personal use cop of the following confidenti publication :-

A Collection of Notes and Minutes by Sir Tej Bahadur Sapru.

(Signature of delivering officer)....

(Signature of receiving officer)...

The ,192 .

Forwarded to the Legislative Department for information.

The ,192 .

. . . . . .

Ceftified that I have this day delivered over to for his personal use cop of the following confidential publication :-

A Collection of Notes and Minutes by Sir Tej Bahadur Sapru.

(Signature of delivering officer)..

(Signature of receiving officer)

The , 192 .

Forwarded to the Legislative Department for information.

The ,192 .

. . . . . .

Certified that I have this day delivered over to for his personal use cop of the following confidential publication :-

A Collection of Notes and Minutes by Sir Tej Bahadur Sapru.

(Signature of delivering officer).

(Signature of receiving officer).

The ,192 .

Forwarded to the Legislative Department for information.

The ,192 .

CONFIDENTIAL.

GOVERNMENT OF INDIA.

LEGISLATIVE DEPARTMENT

A

COLLECTION

OF

NOTES AND MINUTES

BY

THE HONOURABLE SIR TEJ BAHADUR SAPRU, K.C.S.I.

(*Law Member of the Council of the Governor General.*)

1920—1922.

SIMLA
GOVERNMENT OF INDIA PRESS
1926

TABLE OF CONTENTS.

CONFIDENTIAL.

NOTES AND MINUTES BY THE HON'BLE SIR TEJ BAHADUR SAPRU, K.C.S.I.

No. 1.

Question whether a Foreign Consul is protected by Section 86 of the Code of Civil Procedure, 1908, from liability to civil suits.

(24th December, 1920).

(Legislative Department unofficial No. 1609 of 1920).

Section 86 of the Code of Civil Procedure refers only to a Sovereign Prince or Ruling Chief or an Ambassador or Envoy of a Foreign State. The only point in the case is whether the Consul-General for Japan at Calcutta can be treated as an 'envoy.' I think he cannot be so treated. In addition to the authority referred to in Mr. Wright's note, I should like to refer to Section 349 of Fiore's International Law. The question has frequently arisen in American Courts—and there are some English decisions too on the subject. The clearest statement of the law is to be found in *Inre Baiz* (See Scott's cases on International Law, p. 197). In an earlier decision Mr. Justice Story observes as follows :—

> "A Consul, though a public agent is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interfere claims for the restitution of property belonging to the subjects of his own country ; but he is not considered as a Minister, or diplomatic agent of his sovereign entrusted by virtue of his office, with authority to represent him in his negotiations, with Foreign States or to vindicate his prorogations. There is no doubt that his sovereign may specially entrust him with such authority ; but in such case his diplomatic character is super-added to his ordinary powers and ought to be recognised by the Government within whose dominions he assumes to exercise it [*The Anne* (3 Wheat. 435 and 445)]."

In the present case there is nothing to show that the Consul-General in question has been invested with any diplomatic character and should therefore in my opinion be treated as a mere Consul and nothing more. This being so, Section 86 of the Code of Civil Procedure does not apply to the cases and the petitioner should be left to follow the ordinary legal course.

No. 2.

Legality of employment of troops under the Crown in India for the purpose of maintaining essential services.

(22nd January, 1921).

(Legislative Department unofficial No. 11 of 1921).

The question is whether the employment of troops under the forces of the Crown in India for the purpose of maintaining essential services is legal or can be made so with special legislation. I do not wish to traverse the ground covered by Mr. Wright in his very exhaustive and useful note, but I should like just to refer to one or two features of the question.

2. By the oath which a soldier takes, he binds himself to bear true allegiance to His Majesty the King and to observe and obey all orders of His Majesty, his heirs and successors and of the generals and officers set over him. Section 27 of the Indian Army Act, 1911, makes him liable to punishment if he "disobeys the lawful command of his superior officer." If, therefore, a soldier is employed for the maintenance of essential services and refuses to obey the command of his superior officer to carry out the duties assigned to him in that behalf, can he protect himself by pleading that the command was not a lawful one? I do not think that he can successfully urge a plea of that character. Paragraph 571 of Army Regulations, India, Volume II, clearly shows that under certain circumstances soldiers may be required to serve with the civil departments, police or railway administration or in other capacities not connected with their military duties subject of course to the sanction of the Government of India. If in any possible contingency the Government are forced to the conclusion that it is essential for them to maintain any particular service for the security and life of the community, and that this cannot be done without the employment of soldiers, I do not think it would be illegal or unconstitutional on the part of the Government to employ soldiers for that purpose, and soldiers so employed will be bound to carry out the orders in that behalf. It may be that the indirect effect of the employment of soldiers for the maintenance of essential services may be the breaking of a strike, but that will be an incidental consequence and will not, I should think, make their employment for that purpose unconstitutional. I, therefore, think that it is not necessary to undertake legislation on this subject.

No. 3.

Question as to whether a magistrate in British India can lawfully take action against a fugitive criminal under Section 4 of the Indian Extradition Act on a telegraphic request.

(22nd January, 1921).

(Legislative Department unofficial No. 27 of of 1921).

The only question on which we are asked to advise is whether a magistrate in British India can lawfully take action against a fugitive criminal under Section 4 of the Indian Extradition Act on a telegraphic request from the Siamese authorities.

2. Article 9 of the Treaty with Siam says "when either of the Contracting Parties considers the case *urgent* it may apply for the provisional arrest of the criminal, etc.". "Such request will be granted, provided the existence of a sentence or warrant of arrest is proved, and the nature of the offence of which the fugitive is accused is clearly stated." It will be noticed that this article refers only to urgent cases, and there is no mode of application prescribed by it. A telegraphic application would obviously be a good application within its terms. Is there, then, anything in the language of the Indian Act (1903) inconsistent with this view? I don't think there is anything in the language of Section 4 of the Indian Extradition Act to compel us to hold that a magistrate cannot take action upon a telegraphic request. In the first place it is obvious that Section 4 gives the magistrate a very wide discretion. In the next place, it is for the magistrate to say whether the "information or complaint" and the "evidence" which is laid before him is such as *in his opinion* justifies the issue of a warrant. He will no doubt exercise his discretion according to the circumstances of each case. He may in one case take action on a telegraphic request. He may refuse to do so in another. It would be difficult to hold that the telegram itself was "evidence" of the crime, but having regard to the definition of "proved" in the Indian Evidence Act, a magistrate might hold that "as a prudent man he was justified under the particular circumstances of the case to act upon the supposition that the fugitive's Government had issued a warrant against him, or that he was already under a sentence, and that until the telegram was disproved he might and should treat it as a telegram of that Government or some accredited agent of that Government."

3. Section 88 of the Indian Evidence Act by itself would not justify any presumption as to the person by whom such message was delivered for transmission, but reading it with the definition of "proved" and Section 114 of the Evidence Act, a magistrate might well take action under Section 4 of the Indian Extradition Act. The English practice, as pointed out by the Joint Secretary, is also to the same effect.

4. In short, my opinion is that, under Section 4 of the Indian Extradition Act, a magistrate in Burma may act on a telegraphic request made by the Siamese authorities.

No. 4.

Appeals to the Privy Council.—Differentiation between cases under Sections 109 and 110 of the Civil Procedure Code and the Land Acquisition Act.

(25th January, 1921).

(Legislative Department, Progs., December 1921, Nos. 69-81, A. and C.—A.).

I think it would be a pity to differentiate between ordinary civil cases which may be taken up in appeal to the Privy Council under Sections 109 and 110 of the Code of Civil Procedure and a case under the Land Acquisition Act. It would be a different thing if we were considering the general question as to the conditions under which appeals to the Privy Council should be considered. But if an appeal to the Privy Council is allowed in an ordinary bond suit, valued say at Rs. 10,100 where the High Court has reversed the judgment of the first Court, why should an appeal in a land acquisition case in which the High Court has differed from the first Court, provided other conditions as to the valuation are satisfied, be precluded ? Both class of cases just referred to involve pure questions of fact and appreciation of evidence. In ordinary civil cases the Privy Council have particularly in recent years laid considerable stress upon Appellate Courts accepting the Trial Courts' estimate of evidence and have in a large number of cases upset the decisions of the High Courts and restored the decisions of the first courts. I cannot see any reason for denying the privilege to a private individual who finds that the judgment of the first Court has been reversed by the High Court on facts. Perhaps the whole question of appeals to the Privy Council may have to be taken up if and when we are asked to tackle the question of a Supreme Court of Appeal in India—a Resolution on which has been sent up to us by Dr. Gour and it may be that independently of that we may have to consider whether the law as to appeals should not be revised. But until a definite policy is settled, I do not think we should put appeals under the Land Acquisition Act on a footing of their own. Proceedings under the Land Acquisition Act when they are before a Judge are conducted just as an ordinary civil suit is conducted and the Land Acquisition Act itself provides (Section 53) " Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under the Act." I do not say that it is not open to us to give only a limited right of appeal to the Privy Council under the Land Acquisition Act, but the real question is should we do so.

No. 5.

Constitution of the Chamber of Princes. (Use of the expression "Viceroy" in place of the expression "Governor-General in Council" in the Notifications relating to the Royal Proclamation re : the Constitution of the Chamber.)

(31st January, 1921).

(Legislative Department unofficial No. 65 of 1921).

The only question referred to me is whether there is or can be any objection to the use of the expression "Viceroy" in place of the expression "Governor-General in Council" or merely "the Governor-General" in the notifications which are proposed to be issued.

2. I understand that the Ruling Princes and Chiefs prefer to have the word "Viceroy." While I think we ought to give every possible consideration to their preference, I should be reluctant to base any decision on a constitutional question of this character merely on their preference. The position of the Chamber in question is very peculiar. It is not going to be brought into existence by any statutory enactment of the Governor-General in Council. Constitutionally, therefore, we can only trace its source or origin to the prerogative of His Majesty. In the proclamation I find that the expression used is "My Viceroy," and in the Rules of Business too I find that the word "Viceroy" is used throughout. I confess that my mind is not free from considerable doubt on the question of the constitutional position of the Chamber of Princes *vis-a-vis* the Governor-General in Council. The desire of the Princes to have direct relations with the Crown is easily intelligible, but I should be sorry if the use of the expression "Viceroy" in the proclamation or the Rules for the Conduct of Business or in the proposed notifications was at any time taken to indicate any deliberate change in the constitutional relations of the Princes to the Governor-General in Council. No such definite change in the policy has been effected, and the question is far too big to be disposed of in a note of this character which does not deal with the big issue.

3. At the same time, I feel that inasmuch as the Chamber of Princes owes its existence to the exercise of the Royal prerogative and the Proclamation itself uses the word "Viceroy," we may allow that expression to be used in the notifications. I hope that this will not be treated as a precedent affecting the general question of the relations between the Governor-General in Council and the Chiefs in regard to those matters over which the Governor-General in Council has from a constitutional point of view jurisdiction and authority. On this understanding, I think the word "Viceroy" may be allowed to be used in the notifications.

No. 6.

Application from Mr. H. N. Wright, Deputy Superintendent of Police, for naturalization as a British subject. (Interpretation of the rule of International Law regarding Naturalization.)

(1st February, 1921.)

(Legislative Department unofficial No. 46 of 1921).

The legal position is, I think, not free from considerable doubt. Mr. Wright, the petitioner, was born in Trieste of Hungarian parents. His parents migrated to India about 50 years ago, and apparently seem to have severed all connection with Austria and Germany, and as the U. P. Government says "become naturalized British subjects though he (Mr. Wright) does not know where his naturalization papers were taken out by them." For the purposes of this case, we may proceed on the assumption that in point of fact his parents never became naturalized British subjects. It also appears that the petitioner himself was born in Trieste, but he came out to India as a boy and was educated entirely in English Schools. He has been for 28 years in the Police Department, and his character and work are spoken of as being exemplary. He has never been suspected of any kind of pro-German or pro-Austrian tendencies, and has been highly spoken of by his officers for his work. The U. P. Government strongly recommend that Mr. Wright may be granted a certificate of naturalization.

2. Trieste is now an Italian territory, and Article 70 of the Treaty of Peace with Austria runs as follows :—

> "Every person possessing rights of citizenship (pertinenza) in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain *ipso facto* to the exclusion of Austrian nationality, the nationality of the State exercising sovereignty over such territory."

In interpreting this Article of the Treaty, I think the difficulty which really arises is due to uncertainty of the rule of International law on this subject. In the recent edition of International law by Sir Frederick Smith (now Lord Birkenhead), the rule is stated as follows :—

> "The complete conquest of a country has the effect legally of converting the inhabitants of the conquered country into citizens of the conqueror's state, unless, perhaps they leave the conquered territory or being out of it, remain out of it except for a temporary purpose.
>
> Where a country cedes a portion of its territory to a conqueror, the position is somewhat different, for in that case the cession is an act of the ceding state, by which its subjects are presumtively bound ; but it is usual to stipulate that the inhabitants of the portion ceded shall be at liberty to retain their nationality of origin on condition that they leave the territory ceded ; but it is not settled beyond question, either in the case of conquest or of cession that the subject has the right, by leaving the country of retaining his old nationality."

He then refers to an American case which I have not been able to examine as the report is not available here. The point seems to have arisen in South Africa after the South African War, and in one case which

is referred to in Phillipson's Termination of War and Treaties of Peace, there is a quotation from a judgment which runs as follows :—

> " The fact of annexation does not make the people living in the annexed country subjects of the annexing state, unless they, within a reasonable time show by their conduct or their acts, that they acquiesce in their position and choose to become subjects of the conquered power."

The soundness of the South African cases however has been doubted, but Phillipson says " we cannot say there is yet a definitely crystallised rule of International law to the contrary ; but having regard to the evidence furnished by provisions in numerous treaties of cession, it may legitimately be held that the right of option has become a principle of international custom, and that its exercise should be assumed even if it is not expressly stipulated."

We may, therefore, safely assume that the petitioner Mr. Wright has not by virtue of the transfer of Trieste to Italy acquired an Italian nationality. His whole conduct and life show that he has not, and having regard to the fact that the Hungarian law as to nationality is based on " *jus sanguinis* ", we might still hold that his original nationality continued, if it were not for the fact that he and his parents have been away from Austria-Hungary for more than 10 years. The position therefore is that he has lost his original nationality as a Hungarian and has not acquired the Italian either.

3. Under these circumstances, the only question which we have to consider is whether he cannot be granted a certificate of naturalization within the meaning of section 2 of the English statute (4 & 5, Geo. V, c. 17). I think we may well admit Mr. Wright to the benefit of the English statute, and this should serve his purpose very well.

No. 7.

Social boycott of persons elected to the Reformed Councils. Scope of the Indian Elections Offences and Inquiries Act, 1920.

(3rd February, 1921.)

(Legislative Department unofficial No. 68 of 1921).

The scope of the Indian Elections Offences and Inquiries Act (XXXIX of 1920), is clearly indicated in the preamble. The Act is intended to provide for the punishment of malpractices *in connection with elections*. I do not think it was intended to cover the case of social boycott of a person who *has been* elected.

2. Section 171-A (*a*) and (*b*) defines the expressions "candidate" and "electoral right." It will be noticed that the 'electoral right' is the right of a person to stand, or not to stand as, or to withdraw from being, *a candidate*, etc.

Section 171-C (1) creates an offence and penalises interference with the free exercise of 'any electoral right' sub-clauses (*a*) and (*b*) of clause (2) again refer to a 'candidate'. It is thus clear to my mind that Section 171-C was intended to be limited to the stage of election and would have no application to any boycott of a person *subsequent* to his election. It would be doing violence to the letter and the spirit of the law to hold that it contemplated the possibility of a person who has been elected being a candidate at a future election.

I therefore think that no action can be taken under this section against the persons who are molesting or boycotting the gentleman who *has been* elected in Burma.

3. As to whether action could be taken under Section 506, I think the facts before me are too meagre to enable me to give a positive opinion.

If social boycott amounts to an injury to the 'reputation' of the person concerned and is carried on with the intent that he may tender his resignation of his office as a member of the Council which he is not *legally bound to do*, it may amount to the offence of criminal intimidation within the meaning of Section 503, Indian Penal Code and be punishable under Section 506, Indian Penal Code. But this would depend upon the facts of each case, and would necessarily have to be examined from the point of view of the law of libel. In cases of political libels, it is exceedingly difficult to establish a case against the accused or the defendant (*vide* explanation 3 of Section 499). The mere refusal to associate with a person because he has in defiance of public opinion or the opinion of a section of the public gone into a Council will not I think amount to a libel. The conduct of the accused or the defendant must amount to something more, he must be connected with the expression by word or deed or an opinion involving the complainant or plaintiff in social disgrace or disrepute, or casting slur upon his honour and honesty. Mere expression of displeasure, however strong, with the political opinion or actions of an individual will not amount to an injury to his reputation. I, therefore, think that it is exceedingly doubtful whether a prosecution under Section 506, Indian Penal Code, under the circumstances of this case will be successful.

No. 8.

Question of empowering High Courts in India to issue writs of habeas corpus and the repeal of Section 491 (3) of the Criminal Procedure Code.

(11th February, 1921.)

The Resolution of which notice has been given by Mr. Chaudhuri, asks for three definite changes in the law. The first is that he would like Section 491 of the Code of Criminal Procedure to be so amended as to enable not only the High Courts of Calcutta, Madras and Bombay, but every other High Court such as Allahabad, Patna and Lahore to be empowered to issue writs of *habeas corpus*. The second is that the writ may be issued outside the limits of the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay which means that all the High Courts in India, including Allahabad, Patna and Lahore which have no original jurisdiction, shall be empowered to issue writs within the territorial limits of their jurisdiction, original or appellate. The third is that sub-section (3) of Section 491, which says that the provisions of Section 491 will not " apply to persons detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1819 or Bombay Regulation XXV of 1827, or the State Prisoners Act of 1850 or the State Prisoners Act, 1858," shall be repealed. The fourth is that the Governor General or Governor General in Council shall not be competent to suspend the power of the High Court in this respect without an Act passed by the Indian legislature.

(Legislative Department uno.icial No. 87 of 1921).

2. I shall begin with the first and the second. As the law stands at present, the power of issuing a writ of *habeas corpus* is given only to the High Courts of Calcutta, Madras and Bombay, and they, too, can exercise it within the limits of their ordinary original civil jurisdiction. There are historical reasons for the exercise of this power by the Presidency Courts. It is a matter of common knowledge that these Presidency Courts have inherited a number of powers from the old Supreme Courts. The High Court of Allahabad has not inherited anything from the Supreme Court, and the Patna and Lahore High Courts are creations of a very recent date. Whatever may have been the original reasons for the exercise of this power by the Presidency High Courts, I do not think that on principle, this differentiation between the Presidency High Courts and the Allahabad, Patna and Lahore High Courts, can very well be defended.

Again, it seems to me that there is no reason in principle why even the Presidency High Courts should exercise this jurisdiction only within their ordinary original civil jurisdiction, and they should not issue writs of *habeas corpus* outside those limits. As regards this part of Mr. Chaudhury's Resolution, I certainly think that the present legal position requires to be reconsidered, and I confess that I am in sympathy with Mr. Chaudhury's suggestion.

3. It is true that there are certain other sections in the Code of Criminal Procedure which contain provisions of the nature of *habeas corpus*. Reference may be made in particular to Section 100 which provides for search of a person wrongfully confined, to Section 456 which gives a right to any European British subject who is unlawfully detained in

Judicial Department September 1920. No. 13.

custody by any person to apply to the High Court having jurisdiction for orders to be brought before the High Court, and Section 552 which gives power to a Presidency Magistrate or District Magistrate to make an order for the immediate restoration of an abducted woman or a female child under the age of 14 years who has been detained for any unlawful purpose to be restored to her liberty, or to her husband, parent or guardian. At the same time, I think it would be a mistake to confuse these sections with a writ of *habeas corpus*. They deal only with certain fragments of the law of *habeas corpus* and I think it would be right to treat Section 491 as the main section in our criminal law on the subject. As Dicey points out in his law of the constitution " the essence of the whole transaction is that the court can by the writ of *habeas corpus*, cause any person who is imprisoned to be actually brought before the court and obtain a knowledge of the reason why he is imprisoned ; and then having him before the court either then and there, set him free, or else see that he is dealt with in whatever way the law required, as for example, brought speedily for trial ". The first part of the Resolution which seeks to extend the jurisdiction of the High Courts in regard to this matter has in view the security of personal freedom which is afforded by such a writ. As Dicey again points out : " There is no difficulty, and there is often very little gain in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The *habeas corpus* Acts have achieved this end, and have therefore done for the liberty of Englishmen more than could have been achieved by any Declaration of Rights. One may even venture to say that these Acts are of really more importance not only than the general proclamations of the Rights of Man which have often been put forward in foreign countries, but even than such very lawyer-like documents as the Petition of Rights or the Bill of Rights, though these celebrated enactments show almost equally with the *habeas corpus* Act that the law of the English constitution is at bottom judge made law ". I should not, therefore, take any exception to the first part of Mr. Chaudhury's Resolution on the ground that the law as it is affords sufficient protection. I do not think that the law is sufficiently wide if we bear in mind the very limited scope of Section 491.

4. Apart from this, if I was dealing in this note with the question of policy, I should point out that the amendment suggested by Mr. Chaudhury is strongly urged by all moderate Indians as securing a valuable safeguard of personal freedom and is, to my mind, an effective answer to the claim for a Declaration of Rights which is put forward by certain other politicians and which, I think, is obviously inconsistent with the English constitution.

5. I have so far dealt with the first two parts of Mr. Chaudhury's Resolution. The third part of Mr Chaudhury's Resolution wants us to repeal sub-section (3) of Section 491. This point raises a question of policy. Under the law as it stands, no writ of *habeas corpus* can be issued in regard to persons who are detained under Regulation III of 1818 and the other Acts mentioned in that clause. The Calcutta High Court in the well-known case of Stallmann (Indian Law Reports, 39, Calcutta, page 164) ruled that Section 491 of the Code of Criminal Procedure was applicable to cases under the Indian Extradition Act, though the English Extradition Act did not give the right to *habeas corpus*. It will be noticed that the Indian Extradition Act is not mentioned in sub-section (3) of

Section 491. On the other hand, where a person was arrested and detained under Regulation III of 1818 and a writ of *habeas corpus* was applied for on his behalf, the court refused to issue such a writ. (See the case of Amir Khan, 6, Bengal Law Reports, page 392, also page 459.) So far as I know, there is nothing like deportation now in English Law, and it is a question of policy as to whether we shall continue to have Regulation III of 1818 and similar other Regulations on the Statute Book ; but assuming that they are to continue on the Statute Book, it is obvious that the repeal of sub-section (3) of Section 491 as suggested by Mr. Chaudhury would make the provisions of those Regulations absolutely infructuous. I think Mr. Sastri has given notice of a Resolution with regard to repressive legislation, and I believe a committee is going to be appointed on the subject. I am not sure whether Regulation III of 1818, too, will come up for discussion before that committee. I should also like to point out that Mr. Sheshagiri Iyer has given notice of a Bill which seeks to repeal Regulation III of 1818 and the corresponding regulations in Bombay and Madras. Until, therefore, some definite policy with regard to these Regulations is settled, I cannot see how this part of Mr. Chaudhury's Resolution can be accepted.

6. As to the last part of Mr. Chaudhury's Resolution, I do not think it is possible to agree to it. It says that " it will not be competent for the Governor General or Governor General in Council to suspend the power of the High Court in this respect without an Act passed by the Indian Legislature ". It is well known that in periods of political excitement or grave emergency the *habeas corpus* Acts are suspended even in England. (See the discussion on this in Dicey's Law of Constitution, pages 224 to 228.) It is perfectly open under the Indian law to the Governor General to take similar action. The question recently arose in India in the case of Jeeva Nathu and other, (Indian Law Reports, 44, Calcutta, page 459), and in this case Mr. Justice Chaudhury has expressly ruled that the Governor General in Council has the power to oust the jurisdiction of the courts. Under Section 72 of the Government of India Act the Governor General himself may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India for a period of six months. This part of Mr. Chaudhury's Resolution obviously encroaches on that power.

7. I personally think that the Resolution which was notified to us by Mr. Sastri was a better and a simpler one and there could not be, in my opinion, any serious objection to it. As regards Mr. Chaudhury's Resolution, I think only the first part of it is one to which, as I have pointed out above, no objection on legal or constitutional grounds can be taken.

No. 9.

Grant-in-aid to the Bose Research Institute, Calcutta. (Extent of the Secretary of State's powers of control over Indian revenues, under Section 21 of the Government of India Act.)

(28th February, 1921.)

(Legislative Department unofficial No. 118 of 1921).

The question now referred to this Department is whether the Secretary of State cannot, in the exercise of his powers under Section 21 of the Government of India Act, tell the Government of India to spend the money in dispute over the Bose Institute, irrespective of the Institute being considered a central or provincial matter, or a reserved or transferred subject.

2. Section 21 of the Government of India Act gives the Secretary of State power of control over the expenditure of the revenues of India, but this power is also to be exercised '*subject to the provisions of the Act and rules made thereunder*'. The words italicised impose a limitation upon the power and the Secretary of State could not exercise the power except in accordance with that limitation.

3. In the case in point, I think the Secretary of State can certainly, by virtue of the power vested in him by Section 21 rule, that a grant for the Institute should be asked for. Now, suppose this is done by Government one of two things may then happen. Either the Assembly may vote the demand or may withhold its vote. If the former is the case, there is nothing more to say or do on the subject. If the latter is the case, the Governor General in Council may, if he declares that he is satisfied that the demand which has been refused by the Legislative Assembly is essential to the discharge of his responsibilities, act as if it had been assented to [Section 67A (7)]. This same argument would apply to the case of reduction. I imagine the word 'responsibilities' in Section 67A (7) is used in a very large sense—certainly large enough to cover the duty to obey the direction of the Secretary of State under Section 21 of the Government of India Act.

No. 10.

Question as to whether the authority to allow legal practitioners enrolled in one High Court, to appear in any other court in British India should vest in the Bar and not in the Judge.

(*4th March, 1921.*)

(Legislative Department unofficial No. 134 of 1921).

The position in England is that Barristers attach themselves to one circuit or another and if a Barrister belonging to one circuit goes to another he must charge a special fee. Rules on this point are laid down by the Bar Council. There is one material difference between England and India and it is that there is only *one* High Court for England, there are so many in India. All English Barristers after being called to the Bar, get themselves enrolled in the Supreme Court and then select their own circuits. Mr. Norton's idea is to treat the Presidency Towns and other seats of High Courts as Circuits. The difficulty in India is that each Bar. Association has its own constitution and separate rules and regulations, and uniformity of action is not very easy. Besides, there are so many Vakils Associations also—who is going to make the rules and regulations for them ? If they are going to be included in Mr. Norton's scheme what is the *common* body which will legislate for them ?

2. Apart from this aspect of the case, the power of '*admitting*' advocates and Vakils in India is vested by Letters Patent in the High Courts. The practice is not uniform in regard to this matter. The Calcutta High Court was very exclusive until 1915. In 1904 I was to have appeared in the Calcutta High Court. I was told that I would not get the permission—and so I never applied for leave to appear. In 1915 Sir Rashbehary Ghose was brought to Allahabad to oppose me in the High Court and the Judges made a reference to me. I said I would have no objection to Sir Rashbehary appearing in the High Court, if I could have an assurance that Calcutta would extend the same courtesy to Counsel from Allahabad. Sir Rashbehary said he was authorised by the Chief Justice of the Calcutta High Court to state that Allahabad men would be allowed to appear in the Calcutta High Court. I believe Calcutta has since adhered to this. Bombay is the most exclusive court. In 1897 when Mr. Tilak was prosecuted, he took Sir William Garth and Mr. Pugh from Calcutta. The former was not allowed, the latter was allowed to appear—but I believe since then Bombay has not allowed an 'outsider' to appear. I am not personally aware of the state of things in Madras, but I believe Sir Rashbehary was not allowed to appear there only recently. The Lahore Chief Court was more liberal but the Lahore High Court has now adopted the Bombay practice. Only last year I enquired whether I could appear and I was told that it was no use my applying for leave as the rule was absolute. I think the Patna practice is as stated in the Home Department note. I think the attitude of the Government should be that they cannot interfere with the practice of the High Courts or their rules and regulations which have been framed in accordance with the Letters Patent but that they will be willing to place the proceedings in the Legislative Assembly before the various High Courts for the consideration of the Judges. I may add that excepting in Bombay and possibly the Punjab where the rule is rigid, other High Courts have acted upon the rules of reciprocity.

No. 11.

I

Codification of the Hindu Law.

(I-II)

(13th March, 1921.)

(Legislative Department, Progs., May 1921, Nos. 1-2, A. and C.—A.).

The Resolution notified by the Honourable Dr. Ganga Nath Jha relates to a subject of stupendous difficulty. Personally speaking, I am strongly of opinion that the time has come when an attempt should be made to codify some branches, if not the entire body, of the Hindu Law. But it must be distinctly realised that there are so many schools of Hindu Law and such a bewildering mass of commentaries which are now referred to in our courts that the task of codifying should not be undertaken light-heartedly. It would absorb for years together the time and energy of a committee of lawyers and Hindu scholars, and if the Government of India could see their way to accepting such a heavy responsibility, I for one should welcome the undertaking of this responsibility and do the little I can to assist the committee in their work. I have been for a long time interested in this subject but I very keenly realised the enormous difficulty involved in the work.

2. Dr. Ganga Nath Jha is a Sanscrit scholar of great eminence, and I have no doubt that his assistance would be most valuable. He himself spoke to me about this matter a few days ago. I told him that the proper line for any ambitious lawyer or Hindu scholar to follow, would be not to attack the whole body of the Hindu Law but to tackle certain branches of it.

I know that in some decisions Judges, English and Indian, have expressed in emphatic language their great dissatisfaction with the uncertainty of Hindu Law and have found it extremely difficult to feel their way through a confusing mass of conflicting texts and case law. There is no branch of the Hindu Law which to my mind, is in a more unsatisfactory condition than that which relates to the liability of a Hindu son to pay his father's debts. I very well remember that in his dissentient judgment which Sir Henry Richards delivered in a full-bench case in Allahabad a few years ago (which practically revolutionised one branch of the Hindu Law at that time and has been responsible for a great deal of litigation) he strongly expressed the hope that the Indian Legislature would come to the rescue of courts and litigants. Branches of this character of the Hindu Law may very well be taken in hand without much expenditure of time and money.

3. Since I talked to Dr. Ganga Nath Jha, I have had the benefit of reading a most learned lecture delivered at Gray's Inn on Law Reform by Dr. Goudy in 1919. Dealing with the question of reducing the law to the form of a Code of Codes, he says, " The task, though difficult, is perfectly feasible ". He then adds, " There are three alternative methods, apparently, by which codification may be effected :—

1st.—The whole law in all its departments may be codified at one operation *uno flatu* civil, criminal, ecclesiastical, and so on ;

2nd.—Each of the great departments of the law, civil, criminal, fiscal, may be codified separately and independently of each other ;

3rd.—The codification may be effected piecemeal, as it is said, *i.e.*, by taking small portions of the law."

He supports the second method. For my part, having regard to the difficulty of the work and bearing in mind the extremely complicated nature of Hindu Law, I would suggest the 3rd method, which is the only method which can safely be adopted in codifying the Hindu Law at present. Should I be called upon to deal with the subject in the Council of State, the reply that I should like to give would be that before taking any action upon the resolution of the mover, Government must collect the opinions of the High Courts and Hindu lawyers and scholars, and if the necessity for such an undertaking were clearly demonstrated by the opinions so collected, the Government would then consider the feasibility of appointing a committee. I am afraid a direct affirmative or negative to a Resolution of this character is out of the question ; and I feel that if the reply is given on the lines suggested by me Dr. Ganga Nath Jha would probably drop the question for the present, and await the expression of public opinion upon his Resolution.

II

(29th July 1922.)

(Legislative Department unofficial No. 590 of 1922)

I have gone through the opinions of the various local Governments, High Courts, and other legal bodies, which are to be found on this file. The general impression left on my mind, after reading those opinions is that the vast majority of them are opposed to the idea of codification of the Hindu Law.

Last year when I made my two speeches—one in the Council of State and the other in the Legislative Assembly—on the Resolutions which were moved by Dr. Ganga Nath Jha and Mr. Bagde, I took care not to commit the Government to any definite position. I quoted a passage from a recent address delivered by Dr. Goudy, in which he discussed the possibility of codification in England. He suggested three methods, and I commended to the Council of State and the Assembly the method of piece-meal legislation.

Upon a perusal of many of the opinions collected I find that that is the method which has been recommended by many of those who were consulted.

* * * * * * * * * * * *

2. I have summarised the leading opinions in the preceding paragraphs, only to show that we cannot tell the Assembly or the Council of State that the Resolution of Mr. Bagde and Dr. Ganga Nath Jha have received much support. My own opinion continues to be what it was at the time when I made my speeches in the two Houses of the Legislature.

I think there has been some conflict of judicial opinion in respect of certain matters but such conflict is unavoidable and even though we may have the most perfect Code, I do not think that we can avoid judicial conflict. At the same time it seems to me that there are certain portions of the Hindu Law which may very well be codified. I have indicated some of them in my speeches, and they are also indicated in some of the opinions now collected.

3. As regards the question whether legislation should be undertaken in the Provincial Councils or in the Central Legislature, I am afraid that it is extremely difficult to give a positive opinion. From a practical point of view, perhaps it would be more advantageous to leave each Province to codify such portions of the Hindu Law as it may consider necessary. On the other hand, there are some disadvantages in this course. A Hindu may have property in more than one Province and he may find his position made worse if in one Province the legislation is in one way and in the other Province in another way. Apart from this it seems to me that most of the Provincial Councils are and will for many years to come continue to be strong citadels of orthodoxy and conservatism, and the progressive section of Hindus cannot look forward to those Councils doing much useful work in the way of social legislation.

4. If the Central Legislature is to undertake an ambitious work of this character, it must be prepared to spend a considerable amount of money in securing the services of eminent judges and lawyers. The amount of labour and time involved in the work will be simply stupendous, and I cannot believe that it would be possible for any Committee, however capable or competent, to give us a satisfactory Code within anything less than five years ;—even that period seems to me to be rather optimistic.

5. On the whole, I am inclined to agree with the suggestion of my Honourable Colleague, Sir William Vincent, that we might ask Dr. Ganga Nath Jha to put us a question, and in reply to that question we may make a statement indicating the nature and tendency of the opinions which have been collected. I would then leave Dr. Ganga Nath Jha or any other member of the Council of State or the Assembly to take such further action as he may be advised.

No. 12.

Question re. financial liability for the ministerial establishment of the Calcutta High Court.

(4th April, 1921.)

(Legislative Department unofficial No. 189 of 1921).

I do not agree with the view of the Bengal Government that the Governor has no power to give a certificate under section 72-D.-(2)-(*a*). Apparently the view of the Bengal Government is that inasmuch as under section 8 of the Letters Patent of the Calcutta High Court, the Chief Justice may appoint clerks and other ministerial officers "subject to any rules and restrictions which may be prescribed by the Governor General in Council", the Government of India must find the money for the payment of the clerks and the ministerial officers appointed by the Chief Justice. This, to my mind, is not a legitimate interpretation of section 8 of the Letters Patent. The words "subject to any rules and restrictions which may be prescribed by the Governor General in Council", only impose an obligation upon the Chief Justice to make appointments in consonance with the rules and restrictions. They cannot possibly impose a financial obligation upon the Governor General in Council. The subject of the administration of justice is a reserved subject, and although it may be that in certain matters there are direct dealings between the Calcutta High Court and the Government of India, I cannot see that the Government of India can in any sense be held to be directly responsible for finding the money for the clerical establishment of the Calcutta High Court. I think that the Secretary's reference to article 7 of the Instructions to the Governor and the views of the Joint Committee are very opposite and should remove the doubts of the Government of Bengal on this subject.

2. I am certainly of opinion that under section 72-D.-(2)-(*a*) it is open to the Governor of Bengal to certify that the expenditure provided for by the demand which has been rejected by the Legislative Council is essential to the discharge of his responsibility for the administration of justice. If the Governor gives such a certificate then it is obvious that though the demand has been refused by the Legislative Council, the Local Government can restore the figure in the budget. This is the obvious course for the Bengal Government to take, and I do not think that the Government of India can come to the rescue of the Bengal Government or of the Calcutta High Court in a matter like this when the law itself gives ample power to the Governor of Bengal to deal with the situation created by the vote of the Legislative Council.

No. 13.

Dr. Gour's Hindu Coparcener's Liability Bill. (Obligation of a Hindu son to pay his father's debts.)

(22nd April, 1921.)

(Legislative Department, Pro. A., November 1923, Nos. 43-73).

The ' pious ' obligation of a Hindu son to pay his father's debts is based on certain religious sanctions and any Bill which seeks to codify the law on the subject affects the personal law of the Hindus and I think as pointed out by Secretary the previous sanction of the Governor General is necessary. If Dr. Gour will apply for such sanction, I shall be glad to support his application. It seems to me, however, that Dr. Gour has missed the whole point of the controversy and the Bill as submitted by him so far from settling the controversy will only perpetuate it and may possibly make the position very much worse. I shall briefly indicate the points of controversy.

(1) What is the meaning of the expression " antecedent " debt ? There is a tremendous amount of confusion on the subject and with all respect to Their Lordships of the Privy Council, they have contributed not a little to this confusion by their recent judgment in the case of Sahu Ram Chandra *versus* Bhup Singh. Very few lawyers can say what that decision in every part of it means. Already Madras and Allahabad have differed in their reading of it.

(2) When does this pious obligation begin ? Does it begin in the life-time of the father or after his death ?

(3) What is the extent of this obligation ? If the payment of the father's debt is intended to save his soul why should the son refuse to save that soul when the father has left no ' assets ' an expression which has also given rise to a great deal of discussion in cases of joint Hindu families ?

(4) Is the old rule that it is for the son to show that the debt was incurred for immoral purposes before he can be absolved from his liability to pay, to be definitely abandoned in favour of the rule laid down by Sir John Stanley in Chandra Deo's case which has practically been affirmed by the Privy Council in Sahu Ram Chandra's case ? I know some Hindu judges and many Hindu lawyers prefer the old rule.

(5) Why should the Bill concern itself only with minor sons ? An adult son can raise the same plea as a minor son to get rid of his liability. It will never do to have an Act for the minor sons—and to ignore the adult sons. It will make confusion worse confounded. I have noted the above points only to show that the Bill has been drafted apparently in great hurry and without a careful and comprehensive consideration of all the issues involved in the legislation.

No. 14.

Amendment of the Rules in force in the Bengal Presidency so as to prevent aliens appearing for the examination for masters and mates in the Mercantile Marine.

(*24th April, 1921.*)

Commerce—Merchant Shipping, July 1921, A., Nos. 1-2.

(Legislative Department unofficial No. 135 of 1921).

The proposed rules are intended to be made apparently under section 10 of the Indian Merchant Shipping Act, 1859, and the whole object of the proposed rules is to exclude aliens from acting as master or chief officer of a British merchant ship registered in the United Kingdom or in British India, or as skipper or second hand of a fishing boat registered in the United Kingdom except in the case of a ship or boat employed habitually in voyages between ports outside British India.

The point which we have got to consider is as to whether there is any power given in the Statute in the exercise of which this object can be achieved.

2. Section 9 of the Indian Merchant Shipping Act provides for the institution of examination of persons who intend to become masters or mates of foreign-going ships or of home-trade ships of a burden exceeding 300 tons, or who wish to procure certificates of competency.

3. Section 10 of the Act provides for the nomination by Local Governments of two or more competent persons for the purpose of examining the qualifications of the applicants for examination. It then goes on to say, " that the Local Government may, with the sanction of the Governor General of India in Council, make rules for the conduct of such examination and as to the qualifications to be required , and such rules shall be strictly adhered to by all examiners ". There is nothing in this section to justify the making of a rule operating to exclude an alien from examination or employment after examination. I do not think that the expression " qualification " covers nationality. *Prima facie*, that expression seems to refer to competency which may be tested at the examination. The draft notification, which has been sent by the Government of Bengal, follows Circular No. 1616 of the Board of Trade, dated June, 1920 excepting in regard to certain modifications intended to meet Indian requirements, without regard to the fact that the Aliens Restriction Amendment Act of 1919 does not apply to British India, and that the Indian Passport Act, 1920, contains no provision corresponding to section 5 or 12 of the Aliens Restriction Amendment Act, 1919.

If it is intended to exclude aliens I think it will be necessary to amend the law or to have fresh legislation on this subject. As the law stands at present I do not think that it will be legal to make the proposed rules.

No. 15.

(I-II)

Formation of an Army Canteen Board in India. (Application of Indian revenues for this purpose under Section 20 of the Government of India Act.)

I.

(3rd May, 1921.)

(Legislative Department unofficial No 227 of 1921).

I understand that the sole point which we have got to consider at the present stage is whether the Government of India have power to guarantee an overdraft to finance the Canteen Company. The object of this canteen company seems to be to secure better stores for British Soldiers in India, and at cheaper rates. From a strictly legal point of view, what we have got to consider is whether the proposed application of the " revenues of India " is one which can be justified under section 20 of the Government of India Act. It will be noticed that section 20 of the Government of India Act provides that the revenues of India shall " subject to the provisions of this Act, be applied for the purposes of the government of India alone ". Now, corresponding sections in the previous Acts have formed the subject of judicial interpretation. In a case decided by the Calcutta High Court and reported in I. L. R. 38 Calcutta, page 754, at pages 771-774, certain sections of the Government of India Act, 1858, were discussed by Mr. Justice Mukherjee. It seems that the dispute before the Calcutta High Court arose out of the claim of the present Maharaja of Dumraon to the Dumraon estate. The claimant having won in the first court, the defendant, who was a minor, and, as such, under the Court of Wards, filed an appeal to the Calcutta High Court and then made an application for the stay of execution of the decree pending the disposal of his appeal. As security the appellant offered a bond executed by the Chief Secretary to the Government of Bengal for and on behalf of the Lieutenant-Governor of Bengal in Council, who purported to act for and on behalf of the Secretary of State for India in Council. The point which was raised for the respondent was that the Secretary of State could not charge the revenues of India for any purposes other than those sanctioned by the Statute. Reference was made to sections 2 and 40 of the Government of India Act, 1858, and it was argued by the Advocate General, that in as much as it was the duty of the Crown to protect infants, the guarantee offered by the Secretary of State was for the purposes of the government of India within the meaning of section 2 of the Government of India Act, 1858. This argument was not accepted by Mr. Justice Mukherjee, who held that the security offered by the Secretary of State, creating as it did a charge upon the revenues of India, was *ultra vires* in as much as it amounted to an expenditure of the revenues of India for purposes other than those which were sanctioned by the Statute. Mr. Justice Jenkins took a different view, but I am afraid he did not give sufficient weight to the contrary view. It will be noticed that section 2 of the Government of India Act, 1858, also provided that the revenues of or arising in India were to be " applied and

disposed of for the purpose of the government of India alone, subject to the provisions of this Act ". It seems to me that, by a parity of reasoning, it may well be urged that the purposes for which the Government of India would undertake to stand surety for the overdrafts of this canteen company are not statutory purposes within the meaning of the Government of India Act. Again, I may refer to a dictum of Sir Lawrence Jenkins [I.L.R.-28 Bombay, 314 at page 321), where he construed the expression " government of India " in a cognate statute and held that that expression meant this—" the superintendence, direction and control of the country ". I endorse what Mr. Graham says that " we may say that on the information available we do not see how the expenditure can be lawfully incurred under section 20 of the Government of India Act, but that before finally coming to this conclusion we should like to hear and consider the arguments which the Army Department may adduce for holding that the expenditure could be brought within the scope of this section ".

II.

(26th May, 1921.)

I have had the advantage of reading the notes in the Army Department and this Department since I recorded my last note on 3rd May. Having carefully considered the note of Lt.-Col. Morten, dated the 17th instant, I am now inclined to think that he has made out a case and we may say that the Canteen Company having for its object the welfare and health of the Army, the proposed expenditure is one which may be covered by section 20 of the Government of India Act. At the same time it seems to me that the line of argument suggested in para. 2 of Joint Secretary's note is one which the Army Department will do well to adopt in supporting their case on legal grounds. I also agree that it may prevent much trouble in future if the Army Department will approach the Auditor General with a view to securing in advance his approval to the expenditure.

No. 16.

Interpretation of Section 67-A.-(3)-(iii) of the Government of India Act.

(6th May, 1921.)

(Legislative Department unofficial No. 203 of 1921).

There is one remark in the note of Mr. Hailey with which I cordially agree, and it is that the difficulties arising under this particular clause of section 67-A, are of a practical rather than an interpretational nature. I might go a little further and say that the question that this Department is asked to consider is more in the nature of a question of fact than a question of law. At the same time, I am free to confess that having regard to the language of the section it seems to me that certain anomalies are bound to happen whatever view we may take of this part of the section.

2. Sub-clause (*iii*) of clause (3) of section 67-A. deals with the salaries and pensions of two classes of persons : first, those who are appointed by, or with the approval of His Majesty, and secondly, those who are appointed by the Secretary of State in Council. As illustrations of the first, I may refer to Judges of the High Court, Advocates General, and Members of the Executive Council, though in the case of the last named " persons " their salaries are secured by the second schedule of the Government of India Act. As illustrations of the second clause, I may mention the Members of the Indian Civil Service and Members of the Indian Educational Service. As regards the first group, it is obvious that inasmuch as they have been appointed by, or with the approval of His Majesty, their salaries and pensions are not amenable to the *vote* of the Assembly. As regards the second, that is to say, those who have been appointed by the Secretary of State in Council, I think it is clear that their salaries and pensions too cannot be touched by the Assembly. It seems to me that upon the plain words of the section the protection afforded is to the persons and not to the posts. I do not think that it would be open to the Assembly to vote that the salaries, say for example, of those District Judges who are Members of the Civil Service and who as such were appointed by the Secretary of State, should be reduced. Section 96-B.-(2) confers power upon the Secretary of State in Council to make rules for regulating, among other things, the conditions of service, pay and allowances of the Civil Services in India. Reading this section with section 67-A.-(3)-(*iii*) it seems to me to be clear that so far as those persons who have been appointed by the Secretary of State in Council are concerned they are perfectly safe as against the vote of the Legislative Assembly. A post may be protected only in the sense that it is held by a protected person, but I venture to think that if the Government of India decide to appoint a large number of such protected persons to certain posts and their decision is challenged by the Legislative Assembly on financial grounds it would be open to the Legislative Assembly to move substantive resolutions for the abolition of those posts. At the same time it seems to me that so long as those protected persons hold those posts their salaries cannot be reduced. To give a concrete instance, suppose it is proposed to appoint three more Joint Secretaries to any Department of the Government of India, and suppose also that these posts are filled by

members of the Indian Civil Service. The Legislative Assembly may carry a resolution that in their opinion it is not necessary to have these additional Joint Secretaries and the Government of India may either accept that resolution or reject it. If it does accept that resolution the necessary consequence will be that these men will have to go, if it does reject it they will continue to hold their posts and the Legislative Assembly cannot possibly touch their salaries. If, on the other hand, the post of a Deputy Secretary were filled by a member of the Provincial Service it could certainly be attacked and there would be no protection for it under section 67-A., and if the attack prevailed, the necessary consequence would be that the incumbent of the appointment would have to go.

3. As I have already said, the interpretation which has been put in this Department upon the language of Section 67-A.-(3)-(*iii*) may possibly lead to certain anomalies. But I cannot see how it is possible to overlook the fact that in the clause in question the clearest possible reference is made to persons and not to posts. If this interpretation is likely to lead to inconvenient results I think the question of making a reference to the Secretary of State on the subject may well be taken into consideration.

No. 17.

Immunity of Indian Princes and Ruling Chiefs from the Criminal Jurisdiction of British Courts.

(7th May 1921.)

(Legislative Department unofficial No. 220 of 1921).

At the outset, I must point out that before the assumption of my present office, when I was in actual practice I was professionally consulted on behalf of the Maharaja of Kolhapur. I believe at that time the Sessions Judge of Poona had given a decision and I was mainly consulted as to whether the Maharaja should take any further steps in the High Court at Bombay, or any other step, to assert his immunity from the criminal jurisdiction of British Courts. I discussed at length the law with regard to this matter and gave my opinion on the subject ; unfortunately I do not have with me here a copy of that opinion. But I feel that, having regard to the nature of the reference before me now, I can safely express my views in my present official capacity.

2. The question as to whether Indian Princes or Ruling Chiefs are amenable to the jurisdiction of our criminal courts is an extremely nice question of law, and I am free to confess that there are weighty reasons which may be assigned for and also against the assumption of such jurisdiction by our courts. In one word, it seems to me that the legal position is by no means free from doubt, and it also seems to me to be desirable that we should put the whole position on a more satisfactory footing.

3. Taking the law, as it stands, I would first refer to section 2 of the Indian Penal Code, which runs as follows :—

> " Every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said territories ".

Upon a strict literal interpretation of this action, it seems to me that it is impossible to hold that if the ruler of an Indian State commits an offence within British India where the Indian Penal Code applies, he can claim exemption from the jurisdiction of the criminal courts. On the other hand, a question may be raised as to whether he is a person within the meaning of this section. Does the word " person " there mean a private individual, or is it used in the wider significance of even a public person such as the ruler of an Indian State is. It is at least arguable to my mind that an Indian Prince who is proceeded against in a criminal court, may claim immunity on the ground that he is a sovereign prince, and that therefore he is not ' a person ' within the meaning of this section. So far as I am aware, no criminal case relating to the ruler of an Indian State has been decided by any final court of appeal in India. The argument, therefore, must turn upon the doctrine of the immunity of sovereigns from criminal jurisdiction of foreign courts. The position of Ruling Princes in India, however, is very anomalous. They are sovereigns for certain purposes and not sovereigns for others. Within their own territories most, if not all, of them have got civil and criminal jurisdiction,

though in cases of gross mal-administration, I believe it is open to the Suzerain power to interfere under certain conditions.

4. In regard to civil matters, I think the question has been set at rest by the English decision in the case of Statham *versus* the Gaekwar of Baroda (1912 P. D., page 92). The Gaekwar's position there was recognized as that of a sovereign prince who could successfully claim immunity from the civil jurisdiction of English courts, in spite of the fact that he was not a sovereign in the fullest acceptance of that word. The following passages from the judgment of Bargrave Deane J., sum up the position with remarkable clarity, and I therefore make no apology for giving them *in extenso* :—

> " What is the meaning of the word ' suzerainty ' and what are its essentials ? Sir Courtney Ilbert in his work on the Government of India gives a digest of statutory enactments relating to India, and in a supplemental part to that digest are contained definitions of expressions in the digest. He adopts the interpretations given in the Interpretation Act, 1889, and the Indian General Clauses Act, 1897, and in a note says the expression ' suzerainty ' is substituted by the Interpretation Act for the older expression ' alliance ' as indicating more accurately the relation between the rulers of these States and the British Crown as the paramount authority throughout India.
>
> " Thus ' suzerainty ' is a term applied to certain international relations between two sovereign States whereby one, whilst retaining a more or less sovereignty, acknowledges the supremacy of the other. Such a relation may be either in the nature of a fief, or conventional, *i.e.*, by some treaty of peace or alliance in contrast with the fief, which is a sovereignty granted by a lord paramount over some defined territory accompanied with an express grant or jurisdiction.
>
> " Grotius (De Jure Belli ac Pacis) says unequal leagues are made not only between the conquerors and the conquered, but also between peoples of unequal power, even such as never were at war with one another. Grotius, Pufendorf, and Vattel, agree that in unequal alliance the inferior power remains a sovereign State. Its subjects or citizens own allegiance only to their own sovereign. Over their disputes and internal dissensions the suzerain power as such has no jurisdiction. In short the weaker power may exercise the rights of sovereignty so long as by so doing no detriment is caused to the interests or influence of the suzerain power. It follows that the inferior power must in all alliances with other States be controlled by its suzerain. Vattel says a weak State which in order to provide for its safety, places itself under the protection of a more powerful one and engages to perform in return several offices equivalent to that protection, without, however, divesting itself of the right of Government and sovereignty, does not cease to rank among the sovereigns who acknowledge no other law than the law of nations ".

There are other decisions of English Courts on the point. I may, for instance, refer to the cases of Mighell *versus* the Sultan of Johore, 1894

(1) Q. b., page 149 ; and De Haber *versus* the Queen of Portugal, 17 Queen's Bench, 196.

Hall in his International Law says that a sovereign while within foreign territory is exempt from all local jurisdiction in so far and for so long as he is there in his capacity of sovereign. He cannot be proceeded against in any ordinary or extraordinary civil or *criminal* tribunals. He is exempt from payment of all dues and taxes. He is not subject to police or other administrative regulations, and the members of his suite enjoy the same personal immunity as himself.

The rule is again stated as follows in Fiore's International Law, codified :—

> " Foreign sovereigns who, as such, are in the territory of a State cannot, as such, be personally subjected to its jurisdiction. If, however, sovereigns should abuse their position to foment disorder, or to attack the security of the State they may be forced to leave the territory and if they commit hostile acts of exceptional gravity, may be treated as prisoners of war. The principle of extra-territoriality is opposed to subjecting to the *criminal jurisdiction* of the State foreign sovereigns, transiently resident, who may violate the local laws. Nevertheless, the injured State has the right not only to prevent, if need be by force, a criminal act, but even, if it has been accomplished, to seize the offender and to hold him until reparation or idemnity has been obtained ".

Dealing with the question of Indian States, Lord Birkenhead says in his International Law at page 59, " In theory independent, these States are subject to the ultimate jurisdiction on the part of the British Crown, and are for all practical purposes part of the British Empire, and therefore not within the purview of International Law. In 1891, the Indian Government declared that the principles of International Law have no bearing upon the relations between itself and the Native States under the sovereignty of the Queen-Empress ". (See also Westlake, International Law, part I, pages 41 and 42). It may be permissible to urge that the law, as mentioned in this passage, is somewhat widely stated.

5. It seems to me, therefore, that the present state of the law is extremely unsatisfactory. I think we have got to make up our mind as to how far we are prepared to extend immunity to the Ruling Princes of India. Should it be desirable to give them absolute immunity, I think it would be necessary to have an exception added to section 2 of the Indian Penal Code. We cannot do so without at the same time, bearing in mind the cases of foreign sovereigns who are real sovereigns in the true sense of the word, and possibly also certain classes of diplomatic agents. Should it, on the other hand, be considered necessary only to impose a certain check upon the prosecution of Indian Rulers, that is to say, should it be decided to rule that no prosecution should be initiated without the previous sanction of the Governor General in Council, I think it would be necessary to have an appropriate section in chapter 15 of the Code of Criminal Procedure.

On the question of policy, at this stage of the matter, I do not desire to express any opinion.

[1149L1]

No. 18.

(I-III)

Revisional Jurisdiction of High Courts from Interlocutory Orders in Civil Suits and Proceedings. (Proposed amendment of Section 15 of the Code of Civil Procedure, 1908.)

I

(9th May, 1921.)

(Legislative Department unofficial No. 242 of 1921).

This is a question which very frequently arises in Allahabad. As a practising lawyer I could never feel sure what view would ultimately prevail in any 'revision' which raised this point. It all depended upon which Judge had to dispose of the case. Speaking from recollection, I can say that the position was not so bad up to 1910. The new ideas about a revision lying against certain interlocutory orders travelled with certain Judges from Lucknow to Allahabad. The fact, however, remains that during the last 10 or 12 years there has been a considerable amount of uncertainty about the law in Allahabad and I must have appeared in many more cases than are referred to in the judgment of Piggott, J. The old view was that revisions did not lie against interlocutory orders and though in some instances it entailed some hardship and loss of time and money in the end, on the whole it worked very well and at any rate had the merit of certainty about it. Personally I think Mr. Justice Piggott's view is sounder than that of the two Judges who formed the minority. At the same time I think it would be a great mistake to suppose that the law has been settled even for Allahabad by this full bench ruling. When three Judges hold one way and two hold another way, there is a great temptation to the Bar to re-open the question and every practising lawyer knows how to do it. On the other hand even in Calcutta, the older rulings of the Calcutta High Court have been doubted in recent years. Personally I feel that Section 115 is a very beneficent section, but it is very much abused in actual practice, and we should be able to use more precise and definite language. The Privy Council have given repeated warnings against this abuse of the section—but I am afraid those warnings have not had much effect and are not likely to have much effect so long as the section continues to be in its present form. But this is the general aspect of the question. Confining myself to the particular question before us, I would suggest that we should rigorously exclude revisions against interlocutory orders excepting where an order goes to the root of the matter. For instance if the order decides that the Court has or has not jurisdiction to hear the case, I should allow a revision, but there I should stop.

II

(14th June, 1922.)

(Legislative Department unofficial No. 439 of 1922).

I have read many of the opinions which are now on the file. The two extremes of views are represented by the opinions of Mr. Justice Coutts-Trotter of Madras and Mr. Justice Bannerjee of Allahabad. Personally speaking, upon my reading of Section 115 of the Code of Civil Procedure, a revision against an interlocutory order ought not to lie. At the same time I know that revi-

sions against interlocutory orders have been entertained in some courts in a somewhat over-generous manner. I am strongly of opinion that it would be a mistake to amend Section 115 so as to allow revisions against interlocutory orders. I would only make one exception and that is that, where a lower Court decides an issue of jurisdiction in its favour, a revision should be allowed in order to save unnecessary expenditure of time and money, for it not frequently happens that the first Court assumes jurisdiction, records evidence and decides the case and ultimately the entire trial is quashed by the High Court on the ground that the first Court had no jurisdiction. Only to this extent I would amend Section 115 in respect of interlocutory orders. I would not go further. The opinion which I expressed last year on the subject was identical with the opinion which I am expressing now. Only after having read the opinions of many of the Judges I feel stronger in that opinion.

III

(28th June, 1922.)

I do not like the idea of amending Order 43, Rule 1, by including in it an " order " passed under Order 14, Rule 2. Order 14, Rule 2, generally deals with issues of law which may no doubt include an issue relating to jurisdiction, but which may cover a large number of other legal questions also. It would, to my mind, be necessary to amend Order 14, Rule 2, also—but this I do not like.

In the interest of uniformity, I think Section 115 itself should be amended, but I realise the dangers in tinkering with that section. If, however, it is not considered safe to amend Section 115, I would let the matter rest until the Civil Procedure Code is revised. Meanwhile I should have the High Courts to do what best they can by interpreting the law according to their lights.

No. 19.

Petition from Tansukhdas for permission to institute a suit against the Rajah of Kotah.

(9th May, 1921.)

(Legislative Department unofficial No. 247 of 1921).

I have very reluctantly come to the conclusion that the ' consent ' of the Governor General in Council should not be given in this case. Perhaps the petitioner might have induced me to hold otherwise, if he had set forth his facts fully and clearly.

2. I am inclined to agree with the view that the word ' trades ' in Section 86 of the Code of Civil Procedure is intended to imply ' habitual trading '. It may be that the Maharaja of Kotah habitually purchases Mahua leaves for the distillery in his State, but this has not been shown by the petitioner, and I cannot assume that. It is by no means necessary that the Prince or Chief intended to be sued, buys and also sells or makes profit in British India. He may buy goods in British India and sell them elsewhere—but he must be in *the habit* of doing so. This construction is forced on me by the grammar of clause (*b*) of Section 86.

3. Even if I thought that the case being a doubtful one we should advise consent being given so as to afford some protection to a British Indian subject against a Maharaja, I am afraid our ' consent ' could not prevent the Maharaja from urging that the suit did not fall within the purview of Section 86 and was therefore not maintainable by virtue of the consent given by the Government of India (*vide* the Maharaja of Jaipur *versus* Lalji Sahai I. L. R. 29 All., p. 378). This is also a circumstance which has weighed with me. If the facts of the case were a little more clear, I might have taken a different view.

No. 20.

Modification of Section 9 of the Carriers Act, so as to throw on the Plaintiff the burden of proving negligence or criminal act on the part of the carrier, resulting in loss of or damage to goods.

(14th May, 1921.)

(Legislative Department, Progs., November 1921, Nos. 35-43, A. and C.—A.).

The controversy about the Carriers Act seems to be quite as old as the time of Sir Henry Maine. I have read the whole file with great interest to acquaint myself with the progress of views from time to time. I have also read the note of Sir Henry Maine of the 11th of June, 1864, which really formed the Statement of Objects and Reasons. There is nothing in that note with special reference to Section 9 ; and although on several occasions various questions have been raised with regard to some sections of this Act, the precise point which is now raised does not seem to have been pressed with any degree of force on any previous occasion.

2. I understand that the main question with which we are concerned at present is as to whether Section 9 of the Carriers Act should be so modified as to throw on the plaintiff the burden of proving negligence, or criminal act on the part of the carrier resulting in loss of or damage to the goods. As the law stands at present, it is not necessary for the plaintiff to prove that loss, damage or non-delivery has resulted from any negligence or criminal act on the part of the carrier, his servants or agents. It is perfectly true that ordinarily the law does not presume negligence or crime and that it is for the party who alleges that a particular individual has been negligent or guilty of criminal conduct, to establish that allegation. But while that is, no doubt, the general rule, I think that circumstances or the relative positions of two persons may conceivably lead to a modification of that rule. Having regard to the nature of the contract, and particularly to the fact that, when goods have been handed over to a carrier, the owner has no control over them, it seems to me to be obviously good sense to hold that if goods are lost, or damaged, or not delivered, it is for the person who had the control of them during transit to account for them. It also seems to me that it would be imposing too much burden upon the owner of goods to require him to prove how the loss or the damage took place, or to prove the negligence or the criminal act of the carrier, his servants, or agents. I confess that I am not at all in favour of the proposed amendment. In cases of this character it seems to me that it is almost impossible to hope that a plaintiff will be able to discharge effectively the burden of proof which will be laid upon him if the amendment is accepted, and the virtual effect of that amendment may be to give an absolute immunity to the common carrier. I cannot therefore support the proposed amendment.

3. According to English Law, a common carrier is liable for all loss or damage to the goods delivered to him for carriage, unless it be due to an act of God or of the King's enemies, subject to certain conditions, even though the goods be stolen from him by an overwhelming force (see Nugent *v.* Amith, 1876, I. C. P.). The rule of the burden of proof is conveniently stated in an old English case as follows :—

> " All the bailor has to do in the first instance is to prove the contract and the delivery of goods and this throws the burden of proof

that they were lost and the manner they were lost on the bailee of which we have a right to require very plain proofs ".

The Carriers Act of 1830 was passed in England with the main object of protecting common carriers from the great risk which they incurred under the common law in carrying parcels of great value. According to this Act if the value of goods contained in a package exceeds £10, the carrier will not be liable unless at the time of the delivery of the package at his office, the value and nature have been declared by the person delivering the package and an increased charge has been paid or agreed to be paid. It is true that this Act in terms applies to carriers by land. The Indian Act applies, however, to carriers who transport for hire property from place to place by land or inland navigation. It is mainly based either upon the Carriers Act of 1830 or the Common Law though it is difficult to hold that it is exactly to the same effect as the English Law.

I think there is considerable force in the remarks of Mr. Beazley that " Railways will probably take the opportunity of demanding that they should be treated in the same way, and that the railways are already too well protected against the results of the negligence or criminality of their employees ".

No. 21.

Question regarding the validity of a Marriage between a Hindu and a non-Hindu.

(Case of P. R. Lalwani of Karachi.)

(28th May 1921).

(Legislative Department unofficial No. 294 of 1921).

The Foreign Office have received a telegram to the following effect :—

" British Indian subject P. R. Lalwani, Hindu of Karachi, wishes to marry Russian girl in this Consulate and take her back to India. Would marriage be valid in all circumstances and have you any objection ? "

I am not concerned with any political objections that there may be to such a mixed marriage, and I shall therefore deal only with the legal aspect of the question.

2. As the name itself indicates, " Lalwani " is a Hindu of Sindh, and so far as I know the castes that are known in Upper India are practically unknown among the original Hindus of Sindh. But whatever be the caste of Lalwani as a Hindu he is governed by the Hindu law. It is elementary Hindu law that there can be no marriage between a Hindu and a non-Hindu. According to strict Hindu law, as it obtains at present in all parts of India, it is necessary that a Hindu must marry in his own caste. It is at least doubtful whether there can be any marriage between two Hindus belonging to two different sub-castes, though such marriages have been upheld in the case of Shudras. This, however, is immaterial for the purposes of this case and I need not discuss the conflicting views on the question of marriages between persons of different sub-castes. From the point of view of the Hindu Law, I have no hesitation in holding that the marriage of Lalwani with the Russian girl, if celebrated in India, would be wholly invalid, and no British Indian Court would recognise it for any purpose. Marriage according to Hindu law is a sacrament and not a contract, and there can be no sacramental relation between a Hindu and a non-Hindu. The only law under which it is possible for a Hindu to marry a Christian woman in India is contained in Act XV of 1872, Section 4 of which runs as follows :—" Every marriage between persons one or both of whom is or are a Christian or Christians shall be solemnized in accordance with the provisions of the next following section ; and any such marriage solemnized otherwise than in accordance with such provisions shall be void ".

3. But it is obvious that a marriage celebrated in Tehran between a Hindu and a Russian woman (who I presume is a Christian) cannot be said to be a marriage celebrated in accordance with this Act, and it seems to me therefore that it cannot be treated even as a valid civil contract in India. As to whether the marriage can be treated as a valid marriage under the Foreign Marriage Act of 1892, I have not enough material before me to pronounce any definite opinion. The marriage under that Act can only be valid when it is solemnised in the manner provided by that Act

in any foreign country, and I do not know whether any marriage officers have been appointed in Tehran within the meaning of Section 11 of this Act. But assuming that His Majesty's Minister in Tehran has got the powers to solemnize such marriages within the meaning of Section 11 of the Act, I should still hesitate to treat this marriage as valid for reasons to be given later on.

4. The case of Chetti *versus* Chetti, (L. R., Probate Division, 1919, page 67), is a case which has often given me trouble. In that case what happened was that Mr. Chetti, now a member of the Indian Civil Service, married in his student days in England an English woman. Long after the marriage the wife made a petition in the English court for judicial separation, and Mr. Chetti's plea was that inasmuch as he was a Hindu, he carried his personal law with him to England and that according to that personal law, the marriage was not marriage in law. This argument was rejected by the President (Sir Gorell Barnes). It is perfectly possible to defend that decision from the point of view of English law, and particularly when a question of this character has got to be decided in England by an English court. But I doubt very much whether that decision will be followed by Indian Courts when the marriage between a Hindu and a Christian was neither in accordance with the Indian Christian Marriage Act of 1872, nor even in accordance with the Foreign Marriage Act of 1892.

5. With regard to the Foreign Marriage Act of 1892 it should be borne in mind that while that Act only requires one of the parties to be a British subject " the orders in Council (1892 and 1895), however, require both parties to be British subjects, and this is in accordance with the recognized modern rules of private international law on this point ; and the English decisions have established that a marriage of foreigners in an Ambassador's chapel, without bans or license, is null, where neither party is of the country or suite of that Ambassador, certainly in a case where the man belonged to another suite and the woman was not described as domiciled in any Ambassador's family, though she had acquired a matrimonial domicile by a month's residence in England ". (Burge's Colonial and Foreign Law, volume III, pages 185-186).

6. In conclusion, I should say that the intended marriage between Lalwani and the Russian girl, if celebrated in Tehran, will not be recognized as valid for any purpose by any court in India. At the same time it seems to me that if the parties are prepared to take the risk, I do not know of any legal power in the exercise of which we can restrain them from marrying. As to whether it is politically expedient to allow Lalwani to bring his Russian wife to India, I express no opinion as none is sought.

L149LD

No. 22.

Question regarding status in India of Indians, who become naturalised American citizens.

(Case of Professor Gokhale.)

(28th May, 1921.)

(Legislative Department unofficial No. 297 of 1921).

The Indore Darbar have employed Professor S. L. Gokhale as Principal of the Holkar College. After the Professor arrived in Indore, it transpired that he had become a naturalised American citizen, and the Darbar have now applied for the formal consent of the British Government to his employment by the State. The Agent to the Governor General in Central India says, in his letter of the 7th May 1921, that he is not aware what exactly is the status in India of Indians who become American citizens for such purposes as jurisdiction, trial by Darbar Courts, and the purposes of Section 460 of the Criminal Procedure Code.

2. In this file, too, as in the case of Lalwani, the Indian who wishes to marry the Russian girl, I feel that the materials might have been a little fuller. But I do not think that I run any serious risk in expressing my opinion on the assumption that Professor Gokhale has actually become a naturalised American subject.

3. So far as the American Law is concerned, I wish for convenience sake to state it in the words of a learned writer :—

> " The conditions of naturalisation are now governed by an Act of Congress passed in 1906. In effect, an alien seeking to be naturalised in the United States must make a declaration on oath of his intention to that effect before a competent Court ; after the lapse of two years from the date of such declaration, and after five years' residence in all in the United States, and subject to his being of full age, and taking an oath of fidelity to the Constitution, and renouncing his foreign allegiance, together with any title of nobility, he may apply to one of the federal Courts mentioned in the Act, and on proof of the due fulfilment of the prescribed conditions he may thereupon be admitted to the citizenship. This naturalisation, once effected, confers all rights belonging to native citizens, except that being eligible for the office of President or Vice-President ; although a longer period of residence is sometimes required as a condition of eligibility for certain other offices. The effects of such naturalisation will also extend to children who are minors at the time of the naturalisation of the father * * * There is no qualification, such as exists in the British Acts, with respect to the non-recognition of American citizenship in the country of origin." (See Pitt Cobbett's Leading Cases on International Law, Part I, page 185).

4. We may assume that Mr. Gokhale has complied with all the necessary preliminaries for the acquisition of the rights of American citizenship, and that he has now become a naturalised American. The question which now arises is :—Does he retain his American citizenship

upon his return to the home of his origin ? There has been much conflict on this question in America. But the present law seems to be that when a person who is naturalised in the United States, subsequently returns to the State of his origin with intent to reside there permanently, this is regarded as a relinquishment of American citizenship. There is a statute which provides that a naturalised citizen loses his American character upon going back to the state of his origin and residing there for two years or upon residing in any other foreign state for five years. But this is only a presumption and may be rebutted by satisfactory evidence furnished to a diplomatic or consular office of the United States. (See Burges' Foreign and Colonial Law, Volume I, page 128 ; Pitt Cobbett's Leading Cases on International Law, Volume I, page 195 ; Convention between Her Majesty and the United States of America respecting Naturalisation in Piggott's Nationality, Part I, page 351.) Under Section 13 of the British Nationality and Status of Aliens Act of 1914, a British subject, who in any foreign state and not under disability by obtaining a certificate of naturalisation or by any other voluntary or formal act, becomes naturalised therein, is thenceforth deemed to have ceased to be a British subject. I do not think that Section 14 of this Act has any application to the case of Mr. Gokhale for the reason, among others, that he did not presumably become an American citizen during his minority. Nor do I think that Section 15 of the Act has any application to the case of Mr. Gokhale.

5. I do not know when Mr. Gokhale left America and how long he has been in India. If he has been in the country for two years and intends to reside here permanently there will be a presumption, according to the American Law, that he intends to relinquish his American citizenship. But this alone will not suffice to re-invest him with his original nationality as a British subject. Article 3 of the Convention of May the 13th, 1870, will not help Mr Gokhale in regaining the character and privileges of a British subject. The remarks of Sir Fraser Piggott at pages 269 and 270, on this article show that Mr. Gokhale could not very well take advantage of Article 3.

State Papers, Volume 60, pages 37-38.

6. If Mr. Gokhale is inclined to come back to his original nationality, I think, he can recover it by making the declaration set forth in Annexure A to the Naturalisation Act, 1872.

7. In short, the view that I take is that although Mr. Gokhale may have come back to India, he has not recovered his original nationality even though according to American Law he may have lost his rights as a naturalised American citizen by reason of his residence in this country for a period of two years.

8. I must point out that the legal position of Mr. Gokhale is extremely unsatisfactory, and it is for him to decide whether he will continue in this unsatisfactory condition, or whether he would like to come back to his original position as a British subject.

No. 23.

Powers of appointing Assistants to the High Commissioner for India under the Government of India Act.

(1st June, 1921.)

(Legislative Department unofficial No. 302 of 1921).

Section 29A, Government of India Act, says that " His Majesty may by Order in Council make provision for the appointment of a High Commissioner for India in the United Kingdom, and for the pay, pension, powers, duties and *conditions* of employment of the High Commissioner and of his assistants, etc." Although the section does not directly provide for the appointment of the High Commissioner's Assistants, yet, upon a reasonable construction of it, it seems to me that the appointment of such assistants and the conditions of their appointment would be perfectly within the powers of His Majesty. The words " pay " and " conditions of employment " in the section just quoted would in my opinion also justify the extension to such assistants of the protection afforded by Section 67A (3) (*iii*).

2. Under clause 7 of the Order in Council the High Commissioner may appoint such officers—" Assistants "—as he may require ; these appointments are to be made in accordance with general or special orders to be issued by the Governor General in Council which shall prescribe the terms as to pay, pension and leave of absence and conditions of service, generally. But the assistants may be appointed by either direct recruitment or by transfer from the India Office. If they are transferred from the establishment of the Secretary of State in Council, clause 8 of the Order in Council will govern them. Clause 8 as originally passed makes no reference to Section 67A of the Government of India Act, which the proposed redraft does. The obvious effect of the proposed change in this respect is to give the assistants concerned the benefit of Section 67A, or, in other words, to protect them against the vote of the Legislative Assembly. Whether this is desirable or not is a question on which I express no opinion, but I have no doubt that the extension of the benefit of Section 67A. to the Assistants transferred from the India Office will not be *ultra vires* and will be quite consistent with the spirit—and I should think, the letter—of Section 29A of the Government of India Act. In spite of clause 7 of the Order in Council which speaks of the High Commissioner appointing officers, etc., I do not think it is impossible to hold that these appointments or some of them, may not be deemed to have been made by the Secretary of State under Section 67A (3) (*iii*) and the proposed clause 8 of the Order in Council.

No. 24.

Extension of the privileges conferred by the Provident Funds Act to Provident Funds established by Commercial Firms and Companies.

(2nd June, 1921.)

Finance Department, Progs., Pensions and Gratuities, A., August 1921, Nos. 109-112. (Legislative Department unofficial No. 283 of 1921).

I think that at the present stage of the case, the matter is more one of policy than of law, and it seems to me that the proper time to consult this Department will be when the question of policy has been settled. If the benefits of the Provident Funds Act are to be extended to funds established by limited liability companies or mercantile firms, and separate legislation is undertaken to secure that end, one necessary consequence of it would be a further restriction of the rights of the creditors. In this connection it seems to me necessary to refer to Section 60 (*k*) of the Code of Civil Procedure which exempts from attachment or sale 'all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment'. Should any amendment of the present Act of 1897 or fresh legislation be undertaken, I think it would be necessary also to amend the Code of Civil Procedure. This will probably necessitate reference to the Home Department also.

2. In this connection, attention may also be drawn to the Co-operative Societies Act, 1912, which was passed to facilitate the formation of co-operative societies for the promotion of thrift and self-help among the agriculturists, *artisans and persons of limited means.* Under Section 19 of the Act, the general creditors' claims are postponed to the claims of the Society. This is only to show that there are legislative precedents in Acts other than the Act of 1897 for whittling down the rights of the general creditors. I am not in a position to say how far the Co-operative Societies Act has any bearing on the proposal of the Chamber of Commerce, Bombay. This will perhaps require examination by the Departments.

3. As regards the English law on the subject, I do not think I can add much to the notes recorded in this Department. But I should like to say that in the event of Government deciding to accept the proposal of the Chamber of Commerce, I would urge the preparation of a separate Bill on the subject, so as to provide for the creation of special machinery for the working of the law. It may be necessary to provide some safeguards (1) against the instability of the firms which may decide to establish such funds, and (2) against these funds being used by the employers as weapons to fight strikes. All this could not be very well achieved by an amendment of the Act of 1897. I may add that I have come across cases of funds being opened by rich Bankers in the United Provinces for the benefits of their servants, and I understand that this is a very ancient practice based more upon charitable ideas than upon ideas of co-operation.

No. 25.

Extent of ownership of Government over Mosques, Temples and other religious buildings, acquired under the Ancient Monuments Preservation Act, 1904.

(7th June, 1921.)

(Legislative Department unofficial No. 282 of 1921).

Before discussing any provisions of the Ancient Monuments Act it seems to me necessary to have a correct appreciation of the legal position of mosques and temples under the Muhammadan Law and the Hindu Law, respectively. I have had the benefit of reading the elaborate note of my Hon'ble colleague, Mr. Muhammad Shafi. He discusses the question relating to mosques from the point of view of Muhammadan Law. I need not traverse the same ground over again, as I am in agreement with the view that he has taken of the legal position of mosques. I should like, however, to supplement his remarks by making a few observations. The whole law has been conveniently stated in the form of a section by Mr. Tyabji in his recent edition of Muhammadan Law. He states as follows :—

> " In the Hanafi Law where a person makes or specifies a building for the purpose of dedicating a Masjid, the *waqf* is not complete, and his ownership of the land and building does not cease until he divides them off from the rest of his property, and provides a way to go to it, and either permits public prayers to be said therein, or delivers possession of the mosque to a *mutwalli*, or to the judge or his deputy. According to Shiah law the *waqf* of a mosque is complete by the *waqf* making a formal declaration of *waqf* and permitting prayers to be said in the mosque."

Further on he states the law as follows :—

> " It is stated in the Futwa Alamgiri that where a mosque is consecrated and is intended to be reserved for the people of a particular locality, the reservation is void, and persons not belonging to that locality are entitled to worship in it. It has been said in the course of decisions by Indian courts that a mosque cannot be dedicated with a reservation for any particular sect or class of people ; but according to Shafei, a Masjid may be dedicated with such reservation and the effect of the rule of law above stated in British India is not free from doubt. So far as mosques are concerned, except according. to Shafei Law, they are as such open to Muhammadans of one class as to Muhammadans of another class."

The point is beyond all controversy and has been judicially decided by the Privy Council. (Fazal Karim *vs.* Maula Bux, I.L.R., Calcutta, XVIII, page 448, I.L.R. XXXV, Calcutta, page 294). (See especially the judgment of Mr. Justice Mahmud, I.L.R. XII, Allahabad, page 494.)

2. In the event of our coming to any decision with regard to mosques, we have to bear in mind that a mosque which is not a private mosque must be kept for Muhammadans of all classes. The real question, however, to my mind, is somewhat different. We are at present interested in mosques which are in the nature of protected monuments. Some of these mosques may have been recently discovered and some of them may have been in

decay for a long time. The question therefore arises as to whether the original law relating to mosques which are in perfect condition will apply also to mosques which have fallen into decay. On this point there seems to be some conflict among the disciples of Abu Hanif. Imam Mohammad is of opinion that the land and other materials of a musjid in ruins revert to the *waqf* or his heirs, Abu Yusuf being of a different opinion.

For practical purposes the rule as framed by Mr. Tyabji may be taken to meet the case : it runs as follows :—

> " The land where a musjid has been erected does not become the property of its original owner or his heirs, notwithstanding that the musjid has fallen into decay and is no longer used for prayers, nor can its old materials also be used for building or repairing any musjid."

3. As to the question of proprietory rights in mosques I think I cannot do better than quote the language of a distinguished Mahommedan Judge (Mr. Justice Abdul Rahim) from a judgment of his reported in I.L.R. XXXV, Madras, pages 681-683 :—

> " It will suffice for us, therefore, to point out that according to the accepted view of the Sunni schools, which comprise the followers both of Abu Hanifa and Imam Shafei, it is in the very conception of *waqf*, which is the name for a grant by which mosques and similar.....institutions are dedicated,—that all proprietory rights of men should be extinguished in the property so dedicated. The result according to the theory of Muhammadan law is that proprietory right in the subject-matter of *waqfs* becomes vested in God inasmuch as He originally is the owner and creator of all things, and it is by His permission that men acquire rights therein, so that when a man's right ceases in a particular thing, it reverts to the proprietorship of God."

Muhammadan jurists do not divide property, especially dedicated property, into temporal or spiritual property, and in dealing with dedicated property either under the Hindu or the Muhammadan law, I think we have to be particularly careful about employing the language of English law which very often misses the point of view of Eastern systems. For instance, the whole English idea of Trust is entirely foreign both to the Muhammadan and the Hindu Law. Although it is true that for convenience sake or possibly on account of loose thinking, Judges have spoken of legal and equitable estate in Hindu and Muhammadan cases, yet I think there is no warrant for any such classification either under the Hindu or the Muhammadan Law. The estate of a *mutwalli*, if I may use that expression, may be in some respects similar to that of a trustee, but it is not exactly the same.

So far as a *mutwalli* is concerned, he is really the guardian of *waqf* property, and his rights and powers are very strictly regulated by the provisions of the Muhammadan Law ; he has no sort of proprietory interest, either legal or equitable, in the *waqf* property. As Mr. Shafi says " once a *waqf* is made, the property which is dedicated, ceases to be the property of any human being and it vests in God." In legal transactions, or in cases relating to such property, the *mutwalli* of course represents the estate.

4. Coming to the Hindu temples now, properties dedicated to a pious purpose, both according to the Hindu Law and the Roman Law, are placed *extra commercium* (see the Tagore Law Lectures on Endowments by Pran Nath Saraswati, page 124) and a Trust is not required for this purpose ; the necessity of a Trust in such cases is indeed a peculiarity and a modern peculiarity of the English law (*ibid*, page 123). When an idol has once been consecrated by appropriate ceremonies, the deity of which the idol is the visible image resides in it and not in any substituted image. The view which I have just enunciated had a long struggle for its recognition in British Indian courts, and in recent years there was some conflict of opinion among Judges, but it has now been definitely set at rest. I myself had several cases of this character, and I am prepared to say that even according to the Hindu law it would be a mistake to treat a *Shebait* as having any property, legal or equitable, in a temple. The temple belongs to the idol and the idol is treated as a juristic person, though for practical purposes in law suits and in legal transactions the *Shebait* represents the deity.

According to Hindu law, a religious endowment, such as a temple, may either be public or private. A public temple is one to which the public have a right of access. A private temple is a temple for the worship of a family, to which the public *may*, as a matter of indulgence, be admitted, but to which they have no legal right.

The idol itself is capable of holding property (see Jodhi *vs.* Basdeo, VIII, Allahabad Law Journal, 817). In the case of Hindu temples, it must be borne in mind that the destruction of an image does not destroy the endowment, since the endowment is not to the idol, but to the God, of which it is the visible symbol (see the case of Purana, *vs.* Gopal, Calcutta Law Journal, VIII, para. 369, at page 390). At the same time, it must be borne in mind that there are specific rules under the Hindu law as to the revivification of images and the restoration of temples. To quote the words of Pandit Pran Nath Saraswati, " In the case of an image being destroyed by the touch of an impure substance, what Bandkyana directs is the purification appropriate to the material of which the image is composed and the subsequent repetition of the installation ceremony when it becomes a fit object for worship. According to Aditya Purana, the gods cease to reside in images which are mutilated, broken, burnt, deprived of ornaments or of vehicles touched by beasts fallen in contaminated places ; worshipped by the mantras of another god ; and defiled by the touch of an outcaste ".

The Sastras are assiduous in inculcating the necessity of maintaining and repairing the deity, which is established by previous generations.

According to the Vishnu *Dharama*, the kingdom where temples decay suffers proportionate decline, and the merit of repairing an old temple is certainly double that of the original builder.

Now, although a temple may be rebuilt and restored, if the image is not reconsecrated, there is no occasion for worship in it ; but popular sentiment will undoubtedly treat a temple, even without an image, or with a defiled image, as a sacred place.

5. I have tried to put forward in the above paragraphs the Mahomedan view with regard to mosques and the Hindu view with regard to temples. At the same time, I am bound to point out that questions of

the character which are now arising with regard to dilapidated or defiled sacred buildings and protected monuments could never have arisen, in the case of mosques, during Mahomedan times, or in the case of temples, during Hindu times. The rules relating to the obligation of the State with regard to the restoration of such sacred buildings and the rights of the public, which may possibly arise upon restoration, are not very specific. But I venture to think that the absence of such specific rules would not matter very much, as religious sentiment would invest these buildings under any circumstances with a halo of sanctity.

Coming now to the Ancient Monuments Act itself, it is important to bear in mind its preamble. The objects of the Act may be stated to be as follows :—

(1) the preservation of ancient monuments ;

(2) the exercise of control over traffic in antiquities and over excavations in certain places ;

(3) the protection and acquisition in certain cases of ancient monuments and of objects of archæological, historical, or artistic interest.

Except for the word " acquisition " there is nothing in the preamble itself to show that the object of the Act was to vest proprietory rights in the Government. But I am free to admit that there are certain sections in the Act, such as Sections 4, 5 (*g*), 10, 14, which perhaps suggest that the Government may under certain circumstances and certain conditions acquire proprietory rights. In the first place, it seems to me that the acquisition of proprietory rights in public mosques or temples, even though they may be in ruins, runs wholly counter to Hindu and Muhammadan ideas ; and once it is realised by the public, I have no doubt that it will give rise to considerable feeling in the country. But it is possible to hold that these " proprietory rights " are acquired by Government only for a limited purpose and not in the sense in which a private individual acquires any proprietory rights in any property which he purchases. If this limited meaning is placed on the various sections of the Act, it is possible to avert much political mischief. But from a strictly legal point of view, I do not think it would be right to allow legal interpretation to be affected by considerations of expediency. The position undoubtedly bristles with considerable difficulties ; and having read the Ancient Monuments Preservation Act, 1904, carefully, it seems to me that the basic principles of Hindu and Muhammadan law with regard to temples and mosques were not carefully borne in mind when the Ancient Monuments Preservation Act, 1904, was passed.

6. As I have said above, upon a strict interpretation of the various sections of the Act, I am not prepared to say that the Government cannot acquire proprietory rights in mosques and temples which are rescued or restored by them. At the same time such acquisition of proprietory rights is not, in my opinion, consistent with Hindu and Muhammadan ideas. It is for the Department concerned to consider whether they will undertake a revision of the Act so as to employ appropriate language to bring out the basic principle of an Act of this character, which I take to be the assumption of responsibility for the preservation, protection, and maintenance of buildings of this kind. Perhaps the necessity for immediate legislative action may be obviated by framing rules under Section 23 of

the Act, indicating clearly that the Government does not claim to acquire proprietory rights in these properties in the sense in which proprietory rights are acquired in properties of other character, and at the same time safeguarding the rights of the Government in respect of custody and superintendence of these buildings.

I do not know whether any committees have been formed of Hindus and Muhammadans in respect of such buildings. But if none have been formed, I would suggest that the desirability of such committees may be taken into consideration.

No. 26.

Question of time within which possession must be taken of land in respect of which a declaration has been made under the Land Acquisition Act.

(7th June, 1921.)

(Legislative Department unofficial No. 306 of 1921).

There is no time-limit fixed by the statute for the actual taking possession of the land in respect of which a declaration has been made under Section 6 of the Land Acquisition Act. Necessarily, some time must elapse between the date of the declaration under Section 6 and the completion of the further proceedings under the Act, culminating in the actual taking possession of the 'acquired' land. But it is more a matter of common sense and ordinary justice than of law that the time which elapses between these two dates should be reasonable. Where a statute gives a local authority power to do something for public convenience and fixes no time-limit within which it is to be done, I do not think it is a violent presumption that the statute intended it to be done with all reasonable promptitude. Otherwise it may very well be that a declaration is made in 1921, and the land is not actually acquired until 1931. This would be a gross travesty of law and justice and might, or probably would, entail hardships on the owner for which adequate compensation might be difficult.

2. The Land Clauses Consolidation Act (8 and 9 Vic. Cap. 18 Section 123) says that the power of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the special Act shall not be exercised after the expiration of the prescribed period, and if no period be prescribed not after the expiration of three years from the passing of the special Acts. Although it is true that the Indian Act is silent on the question of time-limit I think it is clear that in England an attempt to keep the declaration hanging on the head of an owner without making an attempt to conclude the acquisition proceedings within a reasonable period of time will not be approved.

3. In the present case, it being obvious that funds cannot be found this year for the purchase of this land and the declaration having been made so far back as February 1920, I think the only reasonable and just course to take would be to cancel it and to let the owner exercise his ordinary proprietary rights.

No. 27.

Immunity under the Indian Penal Code, of Witnesses, Parties and Counsel from Prosecution in respect of Defamatory Statements made in the course of Judicial Proceedings.

(13th June, 1921.)

Home Department Progs., Judicial, A., June 1921, Nos. 236-244.

(Legislative Department unofficial No. 331 of 1921).

Personally, all my sympathies as a lawyer are against the view put forward by Sir Ashutosh Mookerji—though I recognise that his interpretation of the law is probably sound. I think witnesses, parties and counsel should have absolute immunity and not merely a qualified privilege, if we want to encourage free and frank evidence. I think there is considerable force in the view of Mr. Justice Richardson. I regret I am unable to agree with the views of the Bihar High Court. My own views on the subject are and for long have been the same as those of Mr. Justice Coutts Trotter and the Chief Justice of Madras. In any case, it seems to me that it would be most inexpedient to add to Section 195 of the Criminal Procedure Code. I think the less we have of Section 195 the better, and personally I shall not be sorry at all if the sanction proceedings are altogether abolished. They multiply work and cause a great deal of mischief.

At the same time, I am not quite clear that there is great urgency for immediate legislation—though if it could be undertaken I should welcome it.

L149LD

No. 28.

Resumption of Practice by Permanent Judges after retirement.

(14th June, 1921).

(Legislative Department unofficial No. 353-A. of 1921).

I regret that I do not agree with my honourable colleague Mr. Mohammad Shafi that the evil does not exist in some provinces. I know of one distinguished barrister Judge of the Allahabad High Court who practised after his retirement from the bench. I worked as his junior. Another Judge of the same Court also appeared after his retirement in a case against me, but this gentleman did not earn a pension. There is a 'leader' in Bihar to-day who was a permanent Judge of the Calcutta High Court for 4 years and then resigned his appointment. In Calcutta itself, there is a 'leader' who was a permanent member of the bench for several years. I believe he gets a pension. I know of another Judge of Calcutta who on his retirement appeared in some cases in the United Provinces. I believe he did not get a pension. In Madras we had a very distinguished Hindu Judge who after retirement practised his profession in the High Court, but he also did not get a pension. On principle I am strongly opposed to allowing permanent Judges to resume practice after retirement. If a barrister or vakil takes a judicial appointment for a shorter period than that which would qualify him to earn his pension he must do so at his risk. It is not right that men who have gone to the bench should come back to the bar. I am not aware that such reversion to the bar has been favoured in England. I cannot recollect of any such case. A retired Judge coming back to the bar has certain advantages over his professional colleagues. His former judicial position and prestige give him those advantages, and in subordinate courts, which are not free from the taint of "hero-worship", he is oftener than not, a hindrance to free and independent justice being done. I strongly support the proposal that we should take such undertaking from men accepting judicial appointments as is suggested in paragraph 5 of this letter. Of course these remarks do not apply to temporary Judges.

No. 29.

Adjustment of Sterling Advances made in the United Kingdom to Lascars. (Proposed amendment of Section 54 of the Indian Merchant Shipping Act, 1859.)

(17th June, 1921).

(Legislative Department unofficial No. 316 of 1921).

The facts, so far as I am able to ascertain seem to be as follows. On the 20th December, 1920, the Board of Trade in England received a communication from the Superintendent, Mercantile Marine Office, Tilbury, asking if the rate of exchange then in force could be "inserted in the Native Agreement". He wrote this letter at the instance of the Master of the Clan Line Steamer "Clan Kenneth", who represented to him that this information would be required by the Shipping Master in India in order to adjust the *advances* made to Asiatic Seamen in sterling in England. Accordingly the Board of Trade addressed a letter on the 8th January, 1921, to India Office, requesting information on the subject. In April, 1921, the Secretary of State wrote a letter to the Government of India in the Department of Commerce, the second paragraph of which it is necessary to quote:—

> "I am to enquire what is the usual practice with regard to the adjustment in India of advances of this nature, and what instructions should be issued to Mercantile Marine Superintendents in this country as to entering the rate of exchange of Lascar Agreements in these cases".

This was a definite request for information on a matter of practice. I also find on the file a telegram from the Secretary of State to the Government of India, bearing date the 12th March, 1920, in which he says that he has agreed with the Board of Trade that adjustment of advances in Indian ports of seamens' wages expressed in sterling, "should be market rate at the time when the advance is made". He requested that Shipping Masters should be instructed to endorse on ship's articles the latest available rate for telegraphic transfers on London, adding to endorsement the words "for the conversion of seamens' wages only". Instructions appear to have been accordingly issued by the Government of India to various maritime Governments in their letter dated the 19th April, 1920.

Again, a further telegram appears to have been sent to the Secretary of State on the 27th of May, 1920, which ran as follows:—

> "Application of market rate of exchange to seamen's wages contravenes Section 54, Indian Merchant Shipping Act I, of 1859. May we issue instructions for payment at rate fixed for adjustment of financial transactions between Imperial and Indian Governments in accordance with provisions of Act"?

The Secretary of State sent a reply, *vide* his telegram dated 15th June, 1920, as quoted below:—

> "Instructions may be issued in accordance with Indian Merchant Shipping Act of 1859 Section 54. But would it not be well to take suitable opportunity of bringing this section into accord with Board of Trade Instructions to officers in British Colonies or Possessions that rate for time being current at place where

payment made is to be taken, see Section 139 of British Act, 1894."

Section 54 of the Merchant Shipping Act I of 1859, is as follows :—

> " When any moneys are payable in India to any seaman or apprentice for wages or otherwise under any agreement wherein such moneys are expressed to be payable in British currency, the seaman or apprentice shall be entitled to demand and recover in the current coin of India the amount due to him, estimated according to the rate of exchange for the time being fixed by the Secretary of State for India in Council * * * for the adjustment of financial transactions between the Imperial and the Indian Governments ".

Section 139 of the English Act, 1894, runs as follows :—

> " Where a seaman has agreed with the master of a British ship for payment of his wages in British sterling or any other money any payment of, or on account of, his wages if made in any other currency than that stated in the agreement, shall, notwithstanding anything in the agreement, be made at the rate of exchange for the money stated in the agreement, for the time being current at the place where the payment is made ".

Obviously enough the above two sections do not accept the same standard of payment. Under the Indian law, the rate of exchange at which payment is to be made to a seaman is that which is fixed by the Secretary of State for India in Council for the adjustment of financial relations between the Imperial and Indian Governments. Under the English law, payment is to be made at the rate of exchange for the money stated in the agreement for the time being current *at the place where the payment is made.* Conflicts are bound to arise in the case of Lascars where any question of payment of wages or any other money under the agreement arises ; and from the seaman's or lascar's point of view, it seems to me that the more equitable principle is that which is embodied in the English section. I am therefore disposed to agree with the suggestion of the Secretary of State that the Indian Act may be amended on the subject.

2. But upon the facts of this case, hardly any question of the interpretation either of Section 54 of the Indian Act, or Section 139 of the English Act, arises. Neither of these sections has any reference to advances made to seamen. Such advances are governed by Section 36 of the Indian Act, 1859, and Section 140 of the English Act, 1894. Again, neither of these sections has any reference to the rate of exchange at which these advances are to be deducted from the wages. As pointed out by the Joint Secretary, " where the advance was made in sterling and the wages were fixed in sterling, if the amount of the sterling advance is deducted from the amount of the sterling wage, no further adjustment is necessary and the question of exchange does not arise in respect of the advance but only in respect of the balance, and thereupon the provisions of Section 54 of the Act of 1859 or of Section 139 of the Act of 1894, as the case may be, will apply ". But where this is not the case, the question of the rate of exchange in respect of deductions to be made will arise. Here the Joint Secretary points out that in the case of a seaman to whom Section 139 of the English Act of 1894 applies, the fair basis would be the market rate at the date of making the advances; while in the case of a

seaman governed by Section 54 of the Indian Act, according to Joint Secretary, " it should be laid down that for adjusting advances the rate of exchange should be the rate fixed for the date of the making of the advance by the Secretary of State for the adjustment of financial transactions between the Imperial and the Indian Governments ". Having regard to the divergent provisions of the English and the Indian Acts, I do not think I can say anything against the view of the Joint Secretary. But it seems to me, as I have already pointed out above, that the more equitable principle is that which is laid down in the English Act, and I am at one with the Joint Secretary in making the suggestion that Section 54 should be assimilated to Section 139, and the view of the Secretary of State for adjusting advances in accordance with the market rate in force at the date of making the advance, should be accepted in respect of all seamen.

No. 30.

Amendment of the Indian Contract Act, 1872, so as to check the practice of champerty and maintenance of litigation.

(20th June, 1921).

(Legislative Department unofficial No. 354 of 1921).

I think Dr. Gour's Bill requires considerable remodelling before it can become acceptable. At the same time I think there is great need for legislation on the subject. Bengal, Bihar and Oudh are the worst sinners in this respect. I have had considerable experience of litigation in Oudh and some experience of cases in Bihar. There is scarcely a Taluqdari case of any importance which is not financed by speculators. I have appeared against and for speculators in numerous cases. The evil is also existent in the province of Agra—though not to the same extent as in Oudh. I do not wish to be harsh or severe on my own profession—but in fairness I must admit that in not a few instances have I found pleaders and also barristers fomenting such litigation and making considerable fortunes out of needy and impecunious litigants; who are willing to execute deeds and promissory notes in favour of lawyers in return for their services. I know how some lawyers in Bengal, Bihar and Oudh have built up their fortunes and if feelings of delicacy did not stand in my way I could give most unsavoury details. But it seems to me that the general question must be kept quite apart from the particular question of the lawyer's share in speculation of this character. We must deal with the lawyer separately and no one will be more pleased than myself if we can stiffen our law so as to make it unprofessional for lawyers to indulge in speculation of this kind. It is really a question of improving professional morality and you cannot do so without reorganising the legal profession and providing an effective disciplinary machinery.

2. As regards champerty in general, the evil does exist and must be stopped. It is no use referring to the doctrine of public policy. As a learned judge once said public policy is an unruly horse—you do not know when it may take you. I am familiar with the cases referred to by Joint Secretary. To take only one of these cases (the case in 35 Cal., page 420), the effect of that decision has been that trafficker's in litigation have become bolder still in the pursuit of their avocation than before. Speaking from memory, I can recollect only one case in Calcutta in recent years in which the Calcutta High Court repudiated a speculative contract on the ground of public policy.

No. 31.

Legislation on Workmen's Compensation.

(23rd June, 1921).

(Legislative Department unofficial No. 815 of 1920).

It must be remembered that it is very rare indeed to find a claim for compensation put forward in a court of law by a workman against his master. Judging from the number of cases that are reported in such industrial centres as Bombay and Calcutta, I think the number of claims that have been presented to courts for adjudication has been exceedingly small and, apart from Calcutta and Bombay, where one might have expected a larger number of these cases, claims of this description are practically unknown in provinces such as the United Provinces, the Central Provinces or the Punjab. In the first place, I think this is due mainly to the fact that the workman in India is very uneducated and does not know his rights. In the next place, in spite of much legal progress that has been made in this country, it must be admitted that, excepting a certain class of cases relating to the law of torts, with which the average practitioner is familiar, there is an appalling amount of ignorance with regard to certain other principles of the law of torts. So far back as the year 1855, the Indian Legislature passed an Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong. It is very seldom that one finds a case in which courts are called upon to give a decision under this Act—I have known just a few—but it will be noticed that this Act applies only to *fatal accidents* and it does not cover by any means the same ground as the Employer's Liability Act or the Workmen's Compensation Act.

2. I believe however that the time has come when legislation on the subject should be undertaken. At the same time I feel that it would be a mistake to base our Bill entirely upon the provisions either of the Employer's Liability Act or the Workmen's Compensation Act of 1906. My main ground for this opinion is that it will take some years before our subordinate courts are really competent to deal with questions which frequently arise in England in cases under the Employer's Liability Act or the Workmen's Compensation Act, and I am not at all sure that we can find a bar ready enough to do justice to cases of this description. Ordinarily, a suit for compensation for loss by the death of a person caused by actionable wrong or for actionable injury which falls short of death is not cognisable by a Small Cause Court in India, (see article 35 of the second Schedule of the Provincial Small Cause Courts Act, 1887). It would therefore, ordinarily go before the regular Civil Court and, assuming that it comprises a claim of anything up to Rs. 1,000 it would ordinarily go before a Munsiff and might go on appeal to a District Judge and again on second appeal to the High Court. Bearing in mind the litigous habit which pervades people of many classes in this country, I do not think that it would really be a boon to the workman to give him a statutory right to file a suit and then to drag him up to the High Court. The expenses of litigation and the enormous delay in the disposal of civil suits will, to my mind, be ruinous. I am therefore in sympathy with paragraph 19 of the draft letter. At the same time I cannot possibly favour the suggestion that this class of cases should go before magistrates or revenue officers. If the civil courts

should know little of the law on the subject, I think I may frankly say that the magistrates and revenue officers know even less. I therefore favour the suggestion that in very large industrial centres it may be necessary to have full-time tribunals with specially selected presiding officers. Take an industrial centre like Cawnpur, with which I am more or less familiar. I can imagine a large number of cases arising there, and I dare say that after some time the bar will be competent to deal with this class of cases, but I cannot think of a single subordinate Judge or, for the matter of that, of a single District Judge in the United Provinces who has any practical knowledge of the law on the subject. I may say that I look upon it as a misfortune that cases under the Compensation Act or the Indian Arbitration Act, which has been extended to the city of Cawnpur, should have to be disposed of by District Judges. Two years ago, a large crop of these cases came up to the Allahabad High Court. I appeared in most of them and I can say from personal experience that the way in which these cases were disposed of was by no means very creditable to the judicial officers concerned. The High Court had enormous difficulty in setting things right, and I am not at all sure whether the condition of things is really even now as satisfactory as one would like it to be. I can therefore imagine what it would mean to entrust cases under the Workmen's Compensation Act to courts which are absolutely unfamiliar with the law on the subject of compensation. We shall probably have to find out the number of districts in each province which require such courts and establish special tribunals for them. Probably the number of such tribunals will not be very large, but, to my mind, if the Workmen's Compensation Act is really to be a boon to the workman, it is no use giving him that Act without giving him at the same time an adequate and competent legal and judicial machinery for the administration of that Act.

3. I would like now just to refer to paragraphs 2 and 4 of the draft letter. As a learned writer points out "by far the greatest blow to any practical utility otherwise resulting to workmen from the common law doctrine that the master is responsible for the acts of the servants was dealt by a decision of the Court of Exchequer in the year 1837 in the much-discussed case of Priestly *vs.* Fowler." The doctrine may be stated to be as follows:—

> "If the person occasioning and the person suffering injury are fellow workmen engaged in a common employment and having a common master, such master is not responsible for the consequences of the injury."

The same learned writer says:—

> "It is not difficult to discover the unsoundness of such a system of reasoning. A workman makes no contract to take the consequences of the negligence of his fellow workman; he would be generally unwilling to do so. The only ground for implying such assent is that he has entered into association with others upon work in the course of which he knows there is risk of injury arising from the negligence of those with whom he thus places himself in contact. If from this knowledge of risk a contract to exclude the principle of *respondeat superior* is to be implied then it should be implied in the case of passengers upon railways and other public conveyances and indeed in the case of everyone who voluntarily subjects himself to the ordinary dangers of street traffic"

4. Many niceties as regards the meaning of " common employment " and " common master " have sprung up in English law and the number of cases on the subject decided by the English courts is exceedingly large. Under the Employers' Liability Act a workman is *prima facie* entitled " to recover where the employer, be he private employer or corporation, has delegated his duties or powers of superintendence to other persons and such other persons have caused injury to the workman by negligently performing the duties and powers delegated to them; but the doctrine of common employment, save in so far as it is thus abrogated, remains ".

5. By the Workmen's Compensation Act of 1897, the employer " was for the first time made liable to compensate his workmen for injuries quite irrespective of the consideration, whether or not either he or any one for whose acts he was in law liable had committed any breach of duty to which the injury was attributable. The intention of the Act made him an insurer of his workmen against the loss caused by injuries which might happen to them whilst engaged in his work. This Act was founded on the German system of insurance of workmen against accidents happening in the course of their employment and was a tentative measure being applicable only to certain leading industries in England ". It was extended to workmen engaged in argiculture by an Act of 1900. The Act of 1906 gave a very wide definition to the word " Workmen ". " It must be borne in mind that none of the liabilities imposed by law upon employers are abrogated by the Workmen's Compensation Act of 1906 and all the previously existing rights of workmen founded either upon common law or statute are preserved to them ".

6. I have just referred to the definition of " workman " in the Act of 1906. It is a question for the Department concerned to consider whether they should include domestic servants also in that definition. Indian conditions are, to my mind, so very different from English that I doubt very much whether at the present stage of our progress it would be right for us to give such an extensive definition to the word "workman ". Although under the increasing influence of modern conditions the relation between the master and the servant in India is not now exactly the same as it was say fifty years ago, yet it seems to me that outside presidency towns and other big centres, and specially in agricultural areas, it would perhaps be difficult to describe that the relation between the master and the servant in India is very much like what it is in the west. No one familiar with the conditions of life among Zemindars and the rural population can fail to be struck by the quasi-feudal relationship that still prevails between the master and the servant. I should not, however, be understood to say that I favour this state of things. At the same time I am not at all sure whether, having regard to the prevailing conditions, an Act of this nature if applicable to domestic servants, will be much of a relief to the servants or that even the servants will be prepared to avail themselves of it.

To sum up, I would suggest the following points:—

(*i*) with reference to industrial workmen in particular the doctrine of common employment should not be incorporated in the Indian law;

(*ii*) a proper definition of " workman ", having regard to Indian conditions, should be given;

(*iii*) the decision of cases arising under this Act should on no account be entrusted to magistrates or revenue officers. I am extremely doubtful as to the wisdom of allowing such cases to go before ordinary civil courts. I am strongly in favour of appointing judges with competent knowledge of the law. Their jurisdiction may be local, and in some cases, where it may be necessary, their jurisdiction may extend over more districts than one;

(*iv*) if we can get competent judges to decide such cases, I think we may follow the English law in regard to making their decisions on facts final, and giving the right of appeal only on questions of law. I say so because a free right of appeal will to a great extent minimise the advantages of this Act, leaving very little of compensation in the hands of the workman after he has gone from one appellate court to another.

No. 32.

(I-II)

Amendment of the Law regarding Life Insurance Policies.

I

(6th July, 1921).

(Legislative Department unofficial No. 391 of 1921).

I do not think that Section 123 of the Transfer of Property Act has anything to do with the voluntary assignment of a life policy by way of gift. Section 123 says that a gift of moveable property may be made by a registered instrument or by delivery. The word 'gift' in this section should be read in the light of the definition given in Section 122 which speaks of gift as 'the transfer of certain existing moveable property'. It is very doubtful to my mind whether a life policy can be spoken of as 'a certain existing moveable property'. No doubt in one sense it is existing moveable property. The policy, *i.e.*, the contract to pay in certain eventualities exists but I should not mix it up with ordinary tangible moveable property. It is in essence an actionable claim, *i.e.*, the right to the money becoming due under the policy (see I. L. R. 37 Bom. at page 209). I think the Privy Council decision just referred to puts the matter beyond all controversy. If it is an actionable claim then the assignment of the policy must be regulated by the provisions of Section 130 which is contained in the special chapter relating to transfers of actionable claims. In this view no question of registration arises or can arise. I am not at all impressed by the necessity of legislation on the subject. I should certainly not recommend the inclusion of the matter in Mr. Rangachariar's Bill which relates to a totally different question. Personally I have very little doubt in regard to the law and I should deprecate any unnecessary attempt at legislation. I am however quite willing to re-examine the question when I undertake the revision of the Transfer of Property Act, *provided* the Life Assurance Companies make out a case for such transfer being always effected by registered instruments.

II

(19th October, 1921).

Having given the matter my further consideration, I must say that I am not much impressed with the necessity of an amendment of the Succession Certificate Act so as to meet the point raised by the Insurance Companies. I understand the objection of the Insurance Companies to be that under their contract they can be called upon to pay the money only to an executor, administrator or assignee of a policy holder, and that the holder of a certificate under the Succession Certificate Act, not being such a person, is not entitled to enforce payment as against them. It will be noticed that when an application for a succession certificate is made under Section 6 of the Act, the petitioner has to mention *inter alia* "the right in which the petitioner claims". Usually it is the heir or legal representative of the deceased who applies for the certificate, and if the person owing the debt pays it, the certificate affords full indemnity to the debtor as regards all payments made in good faith to the person to whom the certificate has been granted (*vide* Section 16). In a case reported in I. L. R. 38

Allahabad, page 474, Mr. Justice Walsh and Mr. Justice Sundar Lall made some very pertinent observations with regard to the scope of the Succession Certificate Act. Mr. Justice Walsh observed as follows:—

> " All that the Act purports to do is to facilitate the collection of debts, to regulate the administration of succession and to protect persons who deal with the alleged representatives of deceased persons against the difficulty which may occur when disputes arise as to whether a claimant is or is not entitled as such personal representative, and the language used in sub-section (1) of Section 4 is the language which is not merely appropriate, but is the language which is invariably adopted to describe in legal terminology the position and claim of a person claiming as a personal representative of the deceased person. My view of the language used in that sub-section is that it was specially adopted in order to keep clear those narrow limits and this is borne out by the words which follow on the word ' production ' namely, ' by the person so claiming '. I think that clearly indicates that the claim contemplated by this section is a claim made by a person in the capacity of personal representative of a deceased person ".

Similarly, Mr. Justice Sundar Lall observed as follows:—

> " In my opinion Act VII of 1889 was, as the preamble itself states, intended to facilitate the collection of such debts on succession, and offers protection to parties paying debts to the representatives of deceased persons. The Act was intended to offer protection to debtors and to assure them that the certificate holder was the person entitled as successor to the effects of the deceased person to receive payment of the debt ".

2. Assuming, therefore that money due under a life policy is a debt, and assuming further that the legal representative of an insured person is entitled to a succession certificate for the recovery of that money, I do not think that an insurance company paying money to the holder of a succession certificate runs any risk.

But is the money due under a policy a debt ? There is no definition of this expression given in the Act itself, but I agree with Mr. Justice Woodroffe when he says, though on another point, " the word ' debt ' is a comprehensive term which I think should receive a liberal construction " (*vide* I. L. R. 42 Calcutta at page 14). The debt may be due either to the person himself who claims it, or after his death to his estate. It is clear that the money due under a policy can, after the death of the insured person, be claimed as part of his estate by his executor, administrator or assignee, or, legal representative, which last expression is used in a very extensive sense in Indian law. It must be borne in mind that, excepting where the law makes it compulsory for a will to be admitted to probate, the will of a Hindu, or for the matter of that, of a Mohammadan, need not be proved at all in a Court of Law. For instance, in the United Provinces it is entirely optional with the executor to obtain or not to obtain a probate. Where the Hindu Wills Act does not apply, I have found executors or legal representatives seeking the easier and cheaper remedy of applying for a succession certificate. But where a probate has been obtained, no question of a succession certificate can arise. The mere

fact that in the insurance policy there is a clause that the money shall be paid to the executor, administrator or assignee cannot in my opinion, deprive the legal heir or legal representative of his legal right to recover the money from the insurance companies or to apply for a succession certificate. Again, it must be borne in mind that even if we concede the demand of the insurance companies, we shall still have to face the difficulty that in many cases where the insured was a member of a joint Hindu family and paid the premia out of joint funds, his coparceners are entitled to claim the money due under the policy by right of survivorship, and they are under no obligation whatsoever to obtain a succession certificate. This point is covered by numerous authorities in almost every court in India. I am therefore unable to see what particular advantage the insurance companies hope to have by an amendment of the Act, and unless their case is put before me more fully and precisely I do not, as at present advised, think that there is any necessity for an amendment of the law.

No. 33.

Question as to whether spirit imported from Java by Messrs. Arratoon and Company for the Bombay Government should be regarded as goods belonging to Government (and therefore not liable to customs duty) within the meaning of the proviso to Section 20 of the Sea Customs Act, 1878.

(8th July, 1921).

(Legislative Department unofficial No. 399 of 1921).

The question referred to us is whether the Bombay Government are entitled to claim that the three lakhs of gallons which Messrs. Arratoon and Company have contracted to supply to them at Rs. 1-12-0 a gallon, delivery free at the Sewri Warehouse, should be regarded as goods belonging to Government within the meaning of the proviso to Section 20 of the Sea Customs Act. It will be noticed that the question as framed by Mr. Innes in his note of the 29th June is a very limited one. I therefore propose to confine myself to the interpretation of Section 20 of the Sea Customs Act and certain sections of the Indian Contract Act.

2. From the letter of the Bombay Government dated the 2nd May 1921, I gather the following facts. It has been found necessary to arrange for the importation of spirit from Java to make up the deficiency in the Bombay Presidency. " This spirit will be imported on behalf of Government and issued to licensed retail vendors at a price fixed by Government". The Collector of Customs, Bombay, thinks that " it is somewhat doubtful whether when making the exemption from duty under Section 20 of the Sea Customs Act, the Imperial legislature contemplated the importation by a local Government of articles for sale to the public the proceeds of which would be credited to provincial revenues, an arrangement which would seem to lead to the diversion of imperial revenues to a provincial exchequer." Customs duties are levied at such rates as are prescribed by or under any law for the time being in force on goods imported or exported by sea into or from any customs port from or to any foreign port, (*vide* Section 20 of the Sea Customs Act). The proviso to this section says that no such duties shall be levied on goods belonging to the Government. The question therefore resolves itself into this: Can the spirit imported from Java be treated as goods belonging to the Government within the meaning of this proviso, and if it can, at what precise point of time can it be so treated ? There is no doubt that the goods in question were imported from Java into Bombay at the instance of the Bombay Government by Messrs. Arratoon and Company. It is equally clear to my mind that the goods were imported not for the purposes of Government but for supply to licensed retail vendors at a price fixed by Government. It does not appear to me from the file who paid the price of the spirit in question and when it was paid. There is nothing to show that the price was paid by the Government either in whole or in part and it may safely be presumed that the price was paid by Messrs. Arratoon and Company. I agree with Secretary that we must apply Section 78 of the Indian Contract Act to the consideration of the question, though it is not of the essence of the matter that the price should have been paid at the time of the contract. The goods might have been unascertained at the time of the contract, but

they could subsequently have been ascertained. The rule is conveniently stated as follows in Remfry's *Lectures on the Sale of Goods*, page 168:—

> "If at the time of making the agreement for sale the goods are not specified or ascertained, the goods may be appropriated or identified or specified as the goods on which the contract is to operate subsequent to the making of the contract either by the assent of both parties or by the seller's determination of an election—that is, appropriation by the seller in pursuance of an authority given to him by contract, and when they have been specified, the presumption being that the property was intended to pass, the property will pass unless there is something to show a contrary intention".

3. There is no doubt to my mind that the spirit in this case must be treated as "ascertained goods" within the meaning of Section 78 of the Indian Contract Act; but it seems to me that we need not pursue the further question as to when the goods passed to Messrs. Arratoon and Company. Upon the facts of the case, I cannot think that the spirit was the property of Government or belonged to Government within the meaning of the proviso to Section 20. With any question arising between Messrs. Arratoon and Company and their sellers we are not concerned. The simple point is that if the spirit belonged to the Government, no duty could be levied on it. If it did not belong to the Government it was liable to duty under Section 20. In the view that I take of the facts of this case, the only conclusion to which I can come is that the goods did not belong to Government and therefore duty should have been levied under Section 20.

No. 34.

(I-II)

Legality of enrolment and transport of volunteers in India for the Angora Legion (Turkish Army), to fight against Greeks. (Application of Sections 4 and 5 (2) of the Foreign Enlistment Act, 1870).

I

(Legislative Department unofficial No. 533 of 1921).

The telegram of Maulvi Abdul Bari says that it is proposed to discharge the religious duty of 'healing' Islam by sending volunteers for the Turkish Army, fighting against the Greek aggression in the Turkish home-lands, and asks whether in view of recent declarations, Government will facilitate their transport to Angora.

2. So far as the declarations referred to are concerned, I am not aware that there has been any declaration in Parliament, but my recollection is that it has been stated, either by the Prime Minister or by some other Ministers, that in the present war going on between Greece and the Angora Government, Great Britain will take no sides. Quite apart from any such declaration, it seems to me that the position is that the Turkish Treaty has not yet been ratified and Great Britain is still at war with Turkey. On the other hand, she is not at war with Greece. The question may therefore be approached from two different points of view. If Indian Muhammadans propose to send volunteers to enlist in the Turkish Army and fight for the Angora Government, they will be helping the enemy. In the alternative it seems to me that such action on the part of Indian Muhammadans may legitimately give rise to a complaint on the part of Greece with which country England is not at war, that England is guilty of a breach of the rule of neutrality. Hall discussed this question in his book on International Law in paragraph 218 at page 638 in the following manner :—

> "The principle, that it is incumbent on a neutral Sovereign to prohibit the levy of bodies of men within his dominions for the service of a belligerent, which was gradually becoming authoritative during the 18th century, is now fully recognised as the foundation of a duty, and its application extends to isolated instances when the circumstances are such as to lead to serious harm being done to a friendly nation. By article 4 of the fifth Hague Convention, 1907, a Corps of combatants cannot be formed nor recruiting offices opened in the territory of a neutral Power to assist the belligerents ; and by article 5 a neutral power must not allow these acts to be performed within its territory."

Greece may very well take her stand on these propositions of law. The law on the subject is more fully explained in Wheaton's International Law at pages 643-647. At page 643, the authority of Vattel is quoted in support of the proposition that "the impartiality, which a neutral nation ought to observe between the belligerent parties, consists of two points : (1) the neutral State must give no assistance where there is no previous stipulation to give it ; nor voluntarily furnish troops, arms and ammunition or anything of direct use in war." "I do not say *to give assistance equally ;* but *to give no assistance,* for it would be absurd that a State

should assist at the same time two enemies." The American case mentioned at page 644 may specially be referred to.

3. The Foreign Enlistment Act of 1870 applies to all the dominions of Her Majesty, and I should think His Majesty's Indian subjects also are governed by it ; and under section 4, if any person without the licence of His Majesty, being a British subject, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with His Majesty, or if any British subject induces another person to accept or agree to accept any commission or engagement in the military or naval service of any such Foreign State, he shall be guilty of an offence against this Act and shall be punishable by fine and imprisonment or either of such punishments. Similarly, section 5 (2) also may under certain circumstances apply.

For all these reasons I am clearly of opinion that any such enlistment of volunteers as is suggested in the telegram before us would be a breach of the law and make the persons guilty of it liable to punishment under this Act. I am also of opinion that such enlistment if allowed to go on in India will amount to a breach of the rule of neutrality.

II

(28th September 1922.)

In the present case what has happened is that some people have, at the suggestion of Mr. Kedwai, opened a list of volunteers for the help and support of the Angora Government. The suggestion seems to have emanated from Mr. Kedwai, and it has been taken up by " The Independent " of Allahabad, which has daily been publishing appeals on the subject and, I understand, has also stated that some 140 people have offered to be enrolled as members of the Angora Legion. The question which has now been referred to me is as to how far this is permissible on the part of any subject or subjects of His Majesty. It was precisely this question which I discussed last year, and I came to the conclusion that any such enlistment of volunteers would be a breach of the law and make the persons guilty of it, liable to punishment under the Foreign Enlistment Act, 1870 ; and that it would also (if such enlistment was allowed to go on) amount to a breach of the rule of neutrality. The Foreign Enlistment Act, 1870, undoubtedly applies to India, *vide* section 2. I agree with Mr. Graham that the promoters of this Angora Legion would be liable to punishment under section 12 of the Act as principal offenders. The position is that as the Treaty of Sevres has not been ratified, Great Britain must still in the eye of International Law be deemed to be at war with Turkey. On the other hand, she is not at war with Greece. If therefore, any subject, without the license of His Majesty, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with His Majesty, he commits an offence against this Act, and incurs the liability imposed by section 4.

2. Similarly, if any person, without the license of His Majesty, being a British subject, quits or goes on board any ship with a view of quitting His Majesty's dominions with intent to accept any commission or engagement in the military or naval services of any foreign state at war with a friendly state, he also commits an offence against this Act and incurs certain liabilities.

3. I am approaching this question wholly from a legal point of view and for the purposes of the legal point it is entirely immaterial that England is or has been anxious to help Turkey.

As regards the liability under section 126 of the Indian Penal Code, to which reference is made by Mr. Graham, it will be observed that the mere making of preparations for the commission of depredation on the territories of any Power in alliance or at peace with the King is a penal offence under the Indian Penal Code. I can only express the opinion that it is conceivable that section 126 of the Indian Penal Code, too, may in certain circumstances apply to those who make such preparations ; but I doubt very much whether a mere appeal for enlistment and a response amounting to nothing more than the giving of their names by certain persons, could be treated as amounting to " preparation " within section 126.

It seems to me that probably many people are ignorant of the legal position and of their liability in a matter of this character, and I would suggest for the consideration of my Honourable Colleagues that perhaps the attention of the public might be drawn to the legal position

No. 35.

Question of the validity of the appointment of Mr. Justice Moti Sagar a Vakil of less than 10 years' standing, to the Punjab High Court, with reference to Section No. 101 (3) (d) of the Government of India Act, (whether additional Judges are required to possess the same qualifications as permanent Judges).

(30th August 1921.).

(Legislative Department unofficial No. 531 of 1921).

The point which arises in this case is to my mind a very short one. Originally in view of the letter of the Chief Secretary to the Punjab Government, the appointment of Mr. Justice Moti Sagar to the Punjab High Court was examined from the point of view of his being an additional Judge of the High Court at Lahore. It now appears that Justice Moti Sagar was not appointed an Additional Judge but an Acting Judge in place of Mr. Justice le Rossignol who was granted furlough on medical certificate from the 16th April to the 28th of July, 1921. In the Punjab Gazette Notification, dated the 18th April, 1921, Rai Sahib Lala Moti Sagar was described as " B.A., LL.B., Vakil " and was appointed to act as Judge of the High Court of Judicature at Lahore during the absence of the Hon'ble Mr. Justice le Rossignol or until further orders. He actually took his seat on the bench on the 16th April 1921. The Punjab High Court is less than ten years old. The old court was merely a Chief Court until the time it was raised to the status of a High Court. For the purposes of this case I must proceed on the assumption that Rai Sahib Lala Moti Sagar is not a person who has been a pleader of a High Court for a period of not less than ten years within the meaning of section 101 (3) (*d*). He is undoubtedly a pleader of considerable standing, but if he was not admitted to the rôle of vakils of a chartered High Court he would not be eligible for the appointment of a Judge within the meaning of the section just referred to.

2. The appointment of Rai Sahib Moti Sagar was made on the occurrence of a vacancy in the office of a Judge of a High Court by the local Government which purported to act under Section 105 (2) of the Government of India Act, but that section requires that the person so appointed must possess such qualifications as are required in persons to be appointed to the High Court. This necessitates clearly a reading of this section along with Section 101 (3) and in this view of the matter it seems to me that the appointment of Rai Sahib Moti Sagar as a Judge of the Punjab High Court was wholly void as he had not been a pleader of a High Court for a period of ten years.

3. If the appointment was invalid, as I think it was, it gives rise to a very serious situation. In my opinion the entire High Court was not properly constituted during that period and every judicial act done by the High Court would be absolutely invalid. This state of things could only be set right by a Validating Act which can be passed by Parliament and I hope this will soon be done.

4. Quite apart from the personal aspects of the case to which I have referred above, it seems to me that the law as it stands imposes a very serious disability on pleaders who were originally enrolled as pleaders of

the Chief Court and who have, since the elevation of that Court to the status of a High Court, been enrolled as vakils of the High Court. They cannot be appointed Judges of the High Court, until the High Court is ten years old. I do not think that this was at all contemplated by the Legislature, the Secretary of State or the Government of India. I think that in order to remove the disability it is necessary to amend the law so as to make it possible for a person who was a pleader of a Chief Court for a period of not less than ten years also to be appointed a Judge of the High Court. Here perhaps I may point out that in the olden days it was the usual practice for barristers and vakils who wanted to practice in the Lahore Chief Court to be enrolled in the Allahabad High Court. Mr. Lal Chand who was for some time a Judge of the Chief Court of the Punjab was a Vakil of the Allahabad High Court and practised there in the early eighties and I have come across his name in the Law Reports. I do not know whether Mr. Moti Sagar was enrolled as a Vakil of the Allahabad High Court. If he was, then his appointment was perfectly valid and we need not trouble ourselves about his case but I presume that he was not, as I believe the practice of enrolment in the Allahabad High Court fell into desuetude since the Punjab University instituted their legal examinations and the Chief Court began to enrol pleaders directly.

5. I have carefully considered the note of Mr. Graham, in the course of which he discusses at length the question as to whether additional Judges of a High Court are also required to possess the same qualifications as are necessary in the case of permanent or temporary Judges. He has come to the conclusion that in his opinion they need not possess such qualifications. I find it somewhat difficult to agree with that opinion and personally I am inclined to agree with the view which has been taken by Mr. Moncrieff-Smith. It is true that for certain purposes the additional Judges of the High Court are not treated on the same footing as permanent Judges, though while they are acting as additional Judges they have all the powers of a Judge of the High Court appointed by His Majesty under this Act, but it seems to me that sub-clause (3) of Section 101 is absolute and unconditional and it begins as follows :—

"A Judge of a High Court must be, etc., etc.,". I should ordinarily take the word 'Judge" in this clause in a large sense so as to apply both to permanent and to additional Judges. If the contrary view were to be accepted there would be nothing to prevent a Revenue officer who was not a barrister or a vakil or who had never served as a District Judge for three years or had been a Subordinate Judge or a Judge of a Small Cause Court for a period of not less than 5 years from being appointed an additional Judge. This would be wholly inconsistent with all the received ideas on the subject and would to my mind be shocking to the legal profession. I personally do not entertain any very serious doubt with regard to this question. I think the qualifications prescribed in sub-clause (3) of Section 101 are as much necessary in the case of permanent and temporary Judges as in the case of additional Judges. A permanent Judge of a High Court is appointed by His Majesty and for purposes of convenience only, power has been given to the Governor-General in Council under Section 101 (2) to appoint persons to act as additional Judges for a period not exceeding two years and to local Governments to appoint acting Judges under Section 105, but I should not interpret the exercise of this power as being independent of the general statement of law which is to be found in sub-clause (3) of Section 101,

which prescribes the necessary qualifications. It is true that in the case of temporary Judges under Section 105, the legislature has thought fit definitely to prescribe that their qualifications must be the same as those of persons to be appointed to the High Court. The reason why no such words were used, especially with reference to additional Judges in sub-clause (2) of Section 101, seems apparently to be that in that very section sub-clause (3) prescribes the general qualifications.

6. In conclusion, I am of opinion first that the appointment of Rai Sahib Moti Sagar was invalid, secondly, that a validating Act is necessary and thirdly, that the disability under which pleaders of Chief Courts rest requires to be removed so as to enable them to be appointed Judges of the High Court.

L149LD

No. 36.

Provision of facilities to Indian Officers and soldiers to obtain possession of ancestral land which was sold or otherwise passed out of their possession.

(5th September 1921.)

(Legislative Department U. O. Regr. No. 500 of 1921).

When a mortgage has been foreclosed, the right to redeem or the equity of redemption is gone (see I. L. R.-40-All., page 407), and there is nothing in the existing law which can help a mortgagor to get back his property. I doubt very much whether we can safely have legislation, the effect of which may be compulsory re-acquisition of the mortgaged property for the mortgagor. Difficult questions relating to the law of limitation are bound to arise if we shall undertake such legislation. Besides, the property may have changed hands and a *bona fide* purchaser for value may have come in the meantime and it will not be fair to him to oust him from the property. It will lead to a great unsettlement of titles and I do not think we can hope for the lawyer element in the legislature to favour such legislation.

2. Mortgages which are still alive should, however, be treated on a different footing. We have to distinguish between a mortgage by conditional sale and a sale with a condition of re-purchase. The distinction is very often very fine and there are still conflicting decisions on the point, notwithstanding the fact that the Privy Council have recently re-stated the law on the subject. It is against these rulings that the poor soldier requires protection. Besides, very often the mortgagor is unable to redeem, because the interest swells up to an impossible figure. The procedure prescribed by Section 83 of the Transfer of Property Act is not to my mind satisfactory as in at least 50 per cent. cases the deposit of money made by the mortgagor is not accepted by the mortgagee and is followed by a suit for redemption which is always very complicated and involves a very dilatory process. I would therefore suggest a special Act for the soldiers (defining this word carefully), the objects of which should be as follows :—

(*a*) to give the courts the power to look to the substance of the transaction—and not to the form,

(*b*) to go behind the contract and reduce the interest whenever it seems to be excessive or unconscionable,

(*c*) to dispense with the two stages of preliminary decrees and final decrees and to provide for a single decree capable of execution, and to fix a time-limit (not exceeding 3 years) within which the entire decree should be executed,

(*d*) to provide for the payment of the decree in easy instalments.

These are some of the difficulties which I experienced in actual practice—and I am mentioning them for the consideration of the Department concerned. If my suggestions are accepted, and a Bill has to be drawn up, we shall have to provide for some other ancillary steps but it is not necessary to go into them at present.

No. 37.

Question of the eligibility of Jagat Shamshere, Nephew of the Prime Minister of Nepal, for appointment to the Indian Civil Service (Question whether Nepal is in India).

(*13th September 1921.*)

(Legislative Department unofficial No. 542 of 1921).

The word "India" as defined in Section 18 (5) of the Interpretation Act, 1889, or Section 3 (27) of the General Clauses Act, 1897, includes the territories of any native Prince or Chief *under the Suzerainty* of His Majesty. Geographically, Nepal may be and is in India, but I doubt whether having regard to the definition of India referred to above, we can say that it is in India. This being so, I do not think it is possible to hold that the nephews of the Prime Minister of Nepal are subjects of "any State in India." If they are not subjects of a State in India, I do not think they are eligible for appointment to the Civil Service in India.

I am afraid the 1918 case is not an exact parallel though even then Nepal was treated as being outside India. The question now arises pointedly under Section 96-A, of the Government of India Act and we must interpret it in the light of the Acts of interpretation referred to above. This necessarily implies a decision as to the question of Suzerainty.

L149LD

No. 38
(I-II)

The Code of Criminal Procedure (Amendment) Bill. (Examination of witnesses on commission.)

I

(24th September 1921.)

(Legislative Department, Pro. A., November 1923, Nos. 34-42).

Under Section 21 of the Indian Extradition Act, 1903, a witness in a criminal case pending in any court in any country or place outside British India may be examined on commission in the manner indicated by Section 78 of the Code of Civil Procedure. The expression British India in this section should in my opinion bear the same meaning as is given to it in the General Clauses Act, 1897, [Section 3 (1)]. A Native State would therefore be a ' country outside British India ' within the meaning of Section 21 of the Indian Extradition Act, 1903. Under Section 78 (*b*) of the Code of Civil Procedure a Commission for the examination of a witness may be issued by " Courts situate in any part of the British Empire other than British India ". Here, too, it seems to me that we must construe the expression British India in the light of the definition given in the General Clauses Act. Whether a ' Native State ' is a part of the British Empire within the meaning of this clause is a somewhat difficult question. My own inclination is to hold that it is, for so long as Native States own British suzerainty, they must be treated as parts of the Empire—though they may be outside British India. They are within ' India ' as defined by the General Clauses Act. But India is not the same thing as British India. I may add that according to my reading of Section 78 (*a*) of the Code of Civil Procedure a Court in a Native State will not be a Court within the meaning of this clause, for though it may be beyond the limits of British India it is not a Court established or continued by the authority of His Majesty or of the Governor-General. Such a Court would however be a Court within the meaning of clause (*b*) Section 78. I therefore think that while Section 21 of the Extradition Act gives the right to Native States Courts to examine witnesses outside their territorial limits, Section 78 of the Code of Civil Procedure prescribes the manner in which such examination may be conducted.

2. The proviso to Section 21 uses the word ' India ' and not British India. Suppose a Court at Chandernagore (French India) issues a commission for the examination of a witness in relation to a criminal case in which the accused is charged with an offence of a political character (*e.g.*, sedition), the witness could not be examined under Section 21. But suppose a British Court in a British possession outside India issues a commission for the examination of a witness, in such a case, I think Section 21 will apply.

II

(31st January 1922.).

I have carefully considered the various points raised by Dr. Gour and have come to the conclusion that there is no force in any one of them.

Examination of witnesses on commission both under the criminal and civil law is an exceptional procedure, necessitated by a desire on the part of the legislature to promote the ends of justice. Commissions out of jurisdiction are as much known to the English law as to the Indian, and I do not think that it has ever been suggested that evidence of a witness recorded out of jurisdiction is inadmissible merely because the foreign court has a procedure of its own or because the court issuing such a commission cannot touch the witness so examined if he is found at the trial to have perjured or prevaricated.

I am afraid Dr. Gour thinks that the sanction of all oral testimony is the liability of a witness who has been guilty of perjury to be punished by the court which is seized of the case. I cannot agree with this view of the law. As I have said above, examination on commission is an exceptional procedure and we cannot apply to it all those rules which apply to examination before the trying court—though no doubt certain elementary principles of our law of evidence must be complied with before such evidence can be read at the trial. Section 507 (2) of the Code of Criminal Procedure lays down that the deposition of the witness examined on commission must satisfy the conditions prescribed by Section 33 of the Indian Evidence Act—one of the essential principles of our law of evidence. The fact that a witness who has been guilty of perjury before a commission in a Native State cannot be punished by Court in British India cannot in my opinion affect the question of the admissibility of his evidence. If this were the rule, I think much reliable evidence which is available in Native States will have to be excluded. In civil cases where questions of evidence arise it is by no means infrequent to examine witnesses in Native States. In a civil case where the question was whether the adoption of a married son was allowed by custom among the Jains I relied upon the evidence of a large number of witnesses examined in Jaipur and other Native States. The case went up to the Privy Council (I.L.R.-32-All., p. 247), and no exception was taken to such evidence on any such ground as is now urged by Dr. Gour.

2. Whether the Indian Evidence Act is a ' Code ' or not within the technical sense of that word, the fact remains that the Indian Legislature has incorporated special rules of evidence in various Acts. Apart from the Bankers' Evidence Act there are various other Acts in which such special rules of evidence are to be found. In the Code of Criminal Procedure, Chapter XLI, the very next chapter after the chapter which we are now considering, incorporates some special rules of evidence. I should treat Sections 503 and 507 also as being in the nature of special provisions. There is nothing in the Government of India Act to prevent the Indian Legislature from making any such special provisions and I cannot at all share the view of Dr. Gour that these provisions are *ultra vires*.

As regards the Indian Oaths Act, it applies to subjects of His Majesty in the territories of Native Princes and States in alliance with His Majesty (*vide* Section 1). As regards those who are not subjects of His Majesty, the fact that oaths cannot be administered to them under the Indian Oaths Act cannot make their evidence inadmissible or illegal merely for that reason. Such evidence cannot be worse than the evidence of a witness in British India to whom no oath has been administered or in regard to whose oath there has been some irregularity (*vide* Section 13 of the Oaths Act).

The fact that a witness in a Native State cannot be punished by a court in British India for contempt of court, if he refused to produce a document only serves to show that there are some inherent defects in the system of examination of witnesses out of jurisdiction. These defects may be irremediable, but they cannot to my mind affect the admissibility of such evidence.

Lastly Dr. Gour, says that a pleader practising in British India may not be allowed to appear before a court of a Native State. The definition of 'pleader' in the Code of Criminal Procedure includes 'any other person appointed with the permission of the court to act in such proceeding'. I venture to hope that no court in a Native State will ordinarily refuse permission to a 'pleader' to appear as such or as 'a person appointed to act in such proceeding'. Again it seems to me that if a Native State court obstinately refuses to allow the accused's pleader to appear before it, it would be a valid objection to the reception of that evidence at the trial. Besides it seems to me that the Governor-General in Council can, before issuing a notification on the subject, arrange by negotiating with the Native States, that our pleaders shall be allowed to apear in their Courts in such cases. If they fail to carry out the agreement, the notification will have to be withdrawn.

L149LD

No. 39.
(I-II)
The Indian Criminal Law (Amendment) Bill. (Provision for punishment for contempt of Court.)
I

(17th October 1921.)

(Legislative Department unofficial No. 622 of 1921).

As regards my personal opinion, I have read almost all the necessary papers on the file and also reconsidered the opinion which I expressed on this Bill seven years ago in my non-official capacity. Having given the matter my further consideration in the light of the material which was not available to me then, I cannot say that, so far as the scope and form of the Bill are concerned I see any justification for a change of my opinion. It will be noticed that in the opinion which I gave in 1914 (Judl. A., January 1916, Nos. 8-9, pages 97-99) I said in paragraph 8 of my letter to the United Provinces Government that " in the event of the Government finding it impossible to drop the measure the power to initiate proceedings for contempts of inferior courts should be vested in the High Courts alone and that such proceedings might be started upon a reference by an inferior court or on an application made by the Local Government or by any party to a suit or case regarding which any objectionable comments were published by a newspaper." The reason which I gave for this opinion at that time was that the trial of such cases by the High Courts would, to a certain extent, guarantee that such proceedings were taken after deliberation and care and were controlled by Judges of a higher status and better legal attainments. This is an opinion which I have in my personal capacity maintained ever since the decision in the case of the King *vs.* Davis reported in 1906, (1, K. B. page 32), was published. I remember having discussed the application of this case to India in a legal journal shortly after the publication of this case, and the opinion that I expressed then is the opinion which I still hold namely, that the Legislature should remove all doubt as to the powers of the High Courts in India to protect inferior courts against contempts of courts during the trial of cases, civil or criminal, by them. No doubt the Madras High Court has held in Venkatrao's case (21, Madras Law Journal, page 832) that it has jurisdiction to take action against a person who has been guilty of contempt of a subordinate court ; but the Calcutta High Court has taken a different view in the case of the Legal Remembrancer, *vs.* Motilal Ghose, (I.L.R. 41, Cal., page 173). In a later decision reported in 45, Cal. page 169, which also related to Babu Motilal Ghose, the Calcutta High Court again reconsidered the entire law of contempt, though not with special reference to contempts of subordinate courts and the judgments of Sanderson, C.J., and Mukerjee, J., are particularly interesting. It seems to me that an amendment of the Indian Penal Code which would give power to subordinate courts to punish contempts amounting to what is known as " the scandalising of courts, " is undesirable mainly for the reason that subordinate courts are not, in my opinion, by their legal training or traditions qualified to exercise such extraordinary jurisdiction. Besides, I do not think that the Legislature will easily agree to a Bill of this character. On the other hand, if special powers are conferred on the High Courts to protect subordinate courts against such contempts, there is less danger of hasty action or wrong judgment, and there is certainly a greater chance of the Legislature being persuaded

to accept a proposal to that effect. But I should like to express my opinion further when as a result of the conference between Mr. Tonkinson and Mr. Moncrieff-Smith the principle and form of the Bill are ultimately decided upon.

II

(3rd February, 1922.).

The other day I was reading the Bombay Law Reporter of the 15th January, 1922, when I came across the case of Emperor *vs.* Balkrishna Govind Kulkarni (1922 XXIV, Bombay Law Reporter, page 16). It occurred to me that it had a distinct bearing on a similar question which was referred to me sometime ago. I have since obtained the file from the Secretary and read the notes on that file. I think it would be useful to bear in mind this case when the whole question relating to the Bill about the contempt of subordinate courts is considered. It will be noticed that Sir Norman Macleod, the Chief Justice of Bombay, differed from Mr. Justice Shah. After referring to the English and Indian cases mentioned in my original note of the 17th October last, I find that the Chief Justice expresses his opinion as follows :—

> "This High Court possesses the same powers of punishing for contempt as the Court of King's Bench by virtue of the Common Law of England. It has powers of superintendence over all courts, civil and criminal, in the Presidency proper, and it may be noted that in this case an application has already been made to this Court to exercise its revisional powers on behalf of the accused, and by virtue of its Charter it can withdraw to itself any case, civil or criminal, pending in any of the courts subordinate to it. It is responsible for the administration of justice not only by itself but also by all the inferior courts, and as it is its duty to see that there is no improper interference by others which may prevent those Courts from properly exercising their powers and therefore if the duty lies at Common Law, the power to enforce its orders must also exist at Common Law."

Mr. Justice Shah, however, took a diametrically opposite view :—

> "I feel a great difficulty in holding that because a contempt of Court is punishable under the English Common Law, it is punishable as such in India even though the Indian law does not make it punishable. It would be in effect creating a new offence to hold that a contempt of a subordinate court as such is punishable. Further, I am unable to hold that this court has powers, which the King's Bench in England exercises under the Common Law of England, with reference to the contempt of other courts."

He also said that it was difficult to find either in the history of the Bombay High Court or in the statutory provisions defining the limitations of the powers of that court any justification for holding that the High Court had powers such as being the *custos morum* of all the subjects of the realm under the Common Law of the Land.

There is no doubt that there is a sharp division of opinion between the Judges on this point. Personally speaking, I am inclined to agree with the view taken by Chief Justice Macleod ; but I need not discuss the point any further.

No. 40.

Judicial arrangements in Ajmer-Merwara.

(11th November 1921.)

(Legislative Department, unofficial No. 627 of 1921).

The point raised in this case is one of considerable difficulty and not free from doubt. Having given the matter my careful consideration I have come to the conclusion that quite apart from the question of policy it would be possible as a matter of law to extend the jurisdiction of the Allahabad High Court to the 118 villages 94 of which belonging to Mewar and 24 of which belong to Marwar. To this extent I am in agreement with the alternative suggestion made by Joint Secretary in his note of the 8th November. But as the matter is one of considerable importance I propose to discuss briefly the various legal questions which arise in this case. Before doing so, however, I must briefly recite the facts. I gather from paragraph 8 of Mr. Holland's letter that there are 118 villages which are administered by the Chief Commissioner of Ajmer on the understanding that the Government will hand over the surplus revenues, if any, after the cost of their administration is deducted, to the two Darbars concerned. The villages do not appear to have been leased with full jurisdiction as is the case in the Berars. Some doubt is entertained as to whether the Allahabad High Court could legally exercise jurisdiction over those villages in case it was decided to bring the judicial administration of the Province of Ajmer under the jurisdiction of the Allahabad High Court.

2. The villages in question which belong to Mewar and Marwar are governed by the two notifications, namely, No. 1007,* dated the 26th May, 1871, and No. 38-J.,† dated the 8th March 1872, given at page 572 of Volume I of Macpherson's British Enactments in force in Native States. It is argued that in view of these two notifications it must be held that these villages are a part of British India. Without questioning at all the validity of the notifications it seems to me that it will not be right to hold that these villages are a part of British India. The expression "British India" is defined in the General Clauses Act as meaning "all territories and places within Her Majesty's Dominions which are for the time being governed by Her Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India". The definition of the expression "India" in the same Act, however, is larger as it was bound to be, than the definition of "British India" and covers also "any territories of any Native Prince or Chief under the suzerainty of His Majesty exercised through any Governor or other officer subordinate to the Governor General of India". In spite of the fact that these villages are for certain purposes administered by British Administration in Rajputana I very much doubt whether we can treat them as being parts of British India. The transfer of jurisdiction for purposes of administration is not necessarily the same thing as the transfer of sovereignty, and as Mr. Holland points out in his letter, the villages have never been leased even with full jurisdiction. The notification* referred to above purports to have been issued in accordance with 17 and 18 Vict.. c. 77, s. 3, but it will be noticed that under that section it was lawful for the

*Macpherson, Vol. I, page 572.

†Judicial A., April 1872, Nos. 10-30.

*No. 1007, dated the 26th May, 1871.

Governor General of India in Council to take under his " immediate authority and management any part or parts of the territories for the time being in the possession or under the Government of the said Company ". The expression " immediate authority and management " as used in section 3 of 17 and 18 Vict. should not, in my opinion, receive a much wider interpretation that would seem to be warranted by the entire Statute.

3. Under section 109 of the Government of India Act, the Governor General in Council may by order authorise any High Court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the High Court was established. It would, for instance, be open to the Governor General in Council by order to authorise the Allahabad High Court to exercise all or any portion of its jurisdiction over Ajmer itself which is a part of British India, although it is not included within the limits for which the High Court was established. But if it is sought to extend the jurisdiction of the said High Court to any part of the administrative unit of Ajmer which, though governed or managed or administered by the Chief Commissioner of Ajmer, is not part of British India, it cannot be done merely under section 109 of the Government of India Act without the aid of the Indian (Foreign Jurisdiction) Order in Council, 1902. Section 2 of this Order provides that the limits of this Order are the territories of India outside British India, and any territories which may be declared by His Majesty in Council to be territories in which jurisdiction is exercised by or on behalf of His Majesty through the Governor General of India in Council, Section 4 of the said order provides that " the Governor General in Council may make such rules and orders as may seem expedient for carrying this Order into effect, and, in particular, for—

(c) determining the courts, authorities, judges and magistrates by whom and for regulating the manner in which any jurisdiction, auxiliary or incidental to, or consequential on, the jurisdiction exercised under this Order is to be exercised in British India ". I therefore think that, while the five non-British parganas in question cannot be taken to be part of British India for the purposes of section 109 of the Government of India Act, they can be brought under the jurisdiction of the Allahabad High Court by a separate notification issued under section 4 of the Indian (Foreign Jurisdiction) Order in Council, 1902. (*Vide* also the *King* versus *Earle of Crewe* (1910), 2 K.B.D.-576, at pages 611 and 612).

No. 41.

(I-II)

Extension of the powers of High Courts to make an Order in the nature of a writ of mandamus requiring any specific act to be done by a public servant or corporation. (Proposed amendment of Section 45 of the Specific Relief Act, 1877.)

I.

(17th November 1921.)

(Legislative Department unofficial No. 598 of 1923).

The old Supreme Courts of the three presidency towns in British India had jurisdiction to issue writs of mandamus under XIII, Geo. III, Cap. 63. This jurisdiction appears to have been preserved in favour of the original side of the High Courts in those towns subsequently established under 24 and 25 Vict., Cap., 104, by their respective Letters Patent. As an early instance of the exercise of this jurisdiction by the Calcutta High Court, reference may be made to the case of the Justices of the Peace for the town of Calcutta *versus* the Oriental Gas Company, Limited (17, W. R. page 364). Various interesting questions relating to the writ of mandamus were discussed and decided in this case, and Sir Richard Couch towards the end of his judgment observed as follows :—

> " We think it sufficient to say that there has never been any doubt that the High Court has still the power which the Supreme Court certainly had to issue a writ of mandamus in such cases as the present."

The same jurisdiction was affirmed by the Bombay High Court so far back as 1872 in the case of the Albert Mills Company, Limited (9, Bombay High Court Reports, page 483).

In Madras the High Court claimed to possess that jurisdiction in the case of *ex-parte* Vadarajulu Mayudu (1, Madras High Court Reports, page 66).

It may however be pointed out that in neither of these two latter cases was the writ of mandamus on the facts of the case actually issued.

2. *Present state of the law*—The Specific Relief Act was passed in the year 1877, and Chapter VIII of that Act deals with the enforcement of public duties. Section 45 of the Act provides that any of the High Courts of Judicature at Fort William, Madras and Bombay may make an order requiring any specific Act to be done or forborne, *within the local limits* of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior court of Judicature subject to certain provisos which it is not necessary to reproduce here. It is important to bear in mind that section 50 of the Act provides that " neither the High Court nor any Judge thereof shall hereafter issue any writ of mandamus ". It seems to me that though the power of the High Courts of Calcutta, Madras and Bombay to issue writs of mandamus was taken away by section 50, section 45 gives them practically the same power ; but it will be noticed that the jurisdiction of these presidency courts to issue orders in the nature of mandamus under section 45 is limited to the limits of their ordinary original civil jurisdiction. The reason why this power was not extended to the only

other High Court existing at that time, namely, the Allahabad High Court, or to the Chief Court at Lahore, was that neither of these two courts possessed any ordinary original civil jurisdiction. We have now three High Courts which exercise only appellate jurisdiction, namely, Allahabad, Patna and Lahore. In addition to these High Courts, we have the Chief Court at Rangoon, which also has original jurisdiction, and two important courts of Judicial Commissioners, namely, the Judicial Commissioners' Court at Lucknow, which I understand may soon be raised to the status of a Chief Court, possibly with original jurisdiction, and the Judicial Commissioner's Court in Sind, which also I understand has original jurisdiction.

Also Judicial Commissioner, Central Provinces.

W. H. V[INCENT].—
22-11-21.

3. I have gone through the papers relating to the Specific Relief Bill in its various stages, and I have not been able to discover any special reason as to why, in the first place, the jurisdiction to issue orders of this character was, in the case of the Presidency High Courts, limited to the limits of their civil original jurisdiction, and in the next place, why the Allahabad High Court was at that time excluded from the exercise of this jurisdiction. It might very well be that the reason why these limitations were accepted at that time was that, so far as the Presidency High Courts were concerned, they could not be deprived of the jurisdiction which they possessed as successors of the old supreme courts. But it seems to me that in principle there is no jurisdiction for limiting the jurisdiction of the Presidency High Courts to the limits of their original civil jurisdiction or for excluding the other High Courts and the Chief Courts above referred to from the exercise of this jurisdiction. In fact, one very distinguished lawyer, Mr. (subsequently Sir) Merydith Plowden, who was Government Advocate at Lahore when the Specific Relief Bill was under consideration and who subsequently rose to be Chief Judge, very pointedly objected to the restriction made in the Bill and advocated the extension of this Chapter to the High Court of the N. W. P. and to the Chief Court of the Punjab. " There is not, so far as I am aware ", said Mr. Plowden, " any mode in either of these provinces of enforcing public duties through the medium of the order of the Court. There are, however, in both provinces persons holding public offices of a permanent nature, corporations and inferior courts of judicature with public duties to perform, and it seems anomalous that there should be no means of compelling their enforcement where an occasion arises calling for such compulsion. I think the Chief Court might fairly be entrusted with the power of administering this extraordinary remedy. No doubt, the power will some day be given, and the true question seems to be whether there is any sufficient objection to conferring it at the present favourable opportunity..... .... Lastly, it is not quite clear within what local limits the several High Courts have power to issue and give effect to orders made under Chapter VII, and I think it would be advantageous to define the local limits of those jurisdictions under this Chapter."

4. The only other lawyer who made reference to this feature of the Bill was Mr. J. G. W. Sykes, who was a very distinguished and learned lawyer practising at that time in Lucknow. He observed that " the reason for withholding this power from the N. W. P. High Court might with advantage be made clearer "

The Select Committee in their final Report. dated the 27th October 1876, in paragraph 19, observed as follows :—

> " We have by section 45 confined the exercise of the power to make orders in the nature of a mandamus to the local limits of the ordinary original civil jurisdiction of the presidency High Courts. We have restricted the power to apply for such orders to cases in which the applicant's property, franchise or personal rights would be injured by the act complained of, and in which that act is clearly required by some law for the time being in force, and we have declared that the High Court shall not make any order expressly excluded by some existing law."

This is all that I find in the Report of the Select Committee. I note that no reasons are given by the Select Committee for the view that they maintain. It is interesting to note what Dr. Whitley Stokes who took such a prominent part in the preparation of the Specific Relief Bill says on the subject. " The operation of the powers conferred by the Chapter " says Dr. Stokes, " is confined to the local limits of the ordinary civil jurisdiction of the court exercising it. The power might usefully be extended to mofussil municipalities, but the necessary legislation would probably be opposed by the local Governments concerned ". (See Anglo-Indian Codes by Dr. Stokes, Volume I, pages 936-937.)

The late Dr. Banerjee in his book on Specific Relief, which is now considered as the standard work in India, observes as follows on this subject :—

> " There seems to be no reason why the power to make orders in the nature of a mandamus should not be conferred upon the High Court at Allahabad and the Chief Courts of the Punjab and Burma. It is true that these Courts never had any original civil jurisdiction, but there seems to be no reason, even in the case of the Presidency High Courts, to limit the power within this jurisdiction. It would be useful to empower these Courts to control mofussil municipalities."

5. I entirely agree with this view. It is only necessary to point out that local self-Government has been enormously developed since the days of Sir Arthur Hophouse who was really responsible for the Specific Relief Act, and the reported cases in Calcutta, Madras and Bombay show that it is by no means uncommon to apply for writs of this character against corporations or public bodies. Our municipalities now control large funds, and recent events have shown that their management of these funds leave much to be desired. Indeed, in some cases it may fairly be said that they have been guilty of the abuse of their function so far as the control of these funds is concerned. In addition to this circumstance, it should be borne in mind that questions relating to franchise are in the altered circumstances of the country of far greater importance to-day than they were when the Specific Relief Act was passed. Excepting within the local limits of the presidency towns the ordinary remedy available to a private individual against municipal corporations lies in instituting a suit for injunction. As instances of this, I may refer to two well known cases ; (1) the case of Ganga Narain *versus* the Municipal Board of Cawnpore (I.L.R. 19, Allahabad, page 313), where the Board framed certain rules which gave them the power to confiscate private rights without making any compensa-

tion or to treat as nuisance acts which were not in law or with regard to public health or convenience capable of being considered nuisance. (2) The second case which may be mentioned as an illustration is the case of Strachey *versus* the Municipal Board of Cawnpore, (I.L.R.-21, Allahabad, page 348), where the imposition of a tax was attacked by Mr Strachey as being absolutely illegal, and the High Court granted an injunction restraining the defendant Board from levying or recovering any tax from Mr. Strachey, but it is obvious that the ordinary remedy of a suit for injunction is a very dilatory remedy.

6. *Nature of mandamus.*—As regards mandamus, it must be borne in mind that it is high prerogative writ, and, to use the words of Blackstone, " it is in general a command issuing in the King's name from the courts of King's Bench and directed to any person or corporation or inferior court of judicature within the King's dominion requiring them to do some particular thing therein specified which appertains to their office and duty, and which the court of King's Bench has previously determined, or which it supposes to be consonant to right and justice. It is a high prerogative writ of a most extensive remedial nature ".

Judge Sanborn defines it as follows :—

> " Mandamus is an action or judicial proceeding of a civil nature, extraordinary in the sense that it can be maintained only where there is no other adequate remedy, prerogative in its character to the extent that the issue of both the alternative and the peremptory or final command is discretionary to enforce only clear legal rights and to compel courts to take jurisdiction or proceed in the exercise of their jurisdiction or to compel corporations, public and private, and public boards, commissions and officers, to exercise their jurisdiction or discretion and to perform ministerial duties which duties result from an office trust or station and are clearly and peremptorily enjoined by law as absolutely official."

7. I think the limits within which this jurisdiction may be exercised are very clearly laid down in section 45, and I do not apprehend that there is any danger which we need be afraid of. It will be noticed that under section 45, the High Court cannot issue or make an order binding on the Secretary of State for India in Council, or on the Governor General in Council, or on the Governor of Madras in Council, or on the Governor of Bombay in Council, or on the Governor in Council of Fort William in Bengal. Nor can it make any order on any other servant of the Crown as such merely to enforce the satisfaction of a claim upon the Crown, or an order which is otherwise expressly excluded by common law for the time being in force. As an illustration of the strength of the safeguards provided in the section, reference may be made to a few recent cases. The first case to which I would like to refer here is the case of Kesho Pershad Sings *vs.* the Board of Revenue, (I.L.R. 38. Cal. page 553). In this case the Maharaja of Dumraon took out a rule under section 45 of the Specific Relief Act against the Board of Revenue calling upon them to show cause why they should not surrender possession of the estate in regard to which he had obtained a decree from the subordinate court and of which they were in possession as Court of Wards for and on behalf of the defendant minor. The rule was discharged by Mr. Justice Mukerjee and Mr. Justice Teunon on the ground ' that where the petitioners may have relief in an

ordinary civil action mandamus will not lie '. After referring to a number of English and American cases, Mr. Justice Mukerjee observed as follows :—

> " These cases recognise the doctrine that a mandamus will lie to prevent a failure of justice upon reasons of public policy, to preserve peace, order and good government, correct official inaction, and enforce official function, but only in cases of last necessity, there the usual forms of procedure are powerless to afford relief, where there is no other clear, adequate, efficient and speedy remedy."

8. In another case arising under the Calcutta Municipal Act and relating to the election of Commissioners, Mr. Justice Fletcher granted the writ with the following observations :—

> " If the omission of a statutory officer to perform his public duties as to the settlement of the election roll in the manner provided by the Act is not forbearing to do something that is not consonant to right and justice, I do not know what is. There can be no standard of right and justice except to see whether the public officer has properly performed the duties cast upon him by the statute or not. It seems to me on the representation of the corporation there is no option but for the court to make this rule absolute, and direct the Chairman to act in accordance with the terms of the rule." (See I.L.R.-39, Cal., pages 604 and 605. Also compare I.L.R.-22, Cal., page 717 and I.L.R. 27, Bombay, page 207) ".

Nor need we fear that the extension of this power to the High Courts so as to enable them to deal with erring municipalties in the mofussil will place any very large powers in their hands and may lead to a very serious interference with their liberty of action or their normal growth. The limits of interference in the case of statutory bodies were laid down by Lord Cottenham in an old English case in a well known passage. " The limits within which the court interferes with the act of public functionaries," said Lord Chancellor Cottenham, " are clear and unambiguous, so long as they confine themselves within the exercise of those duties which are confided to them by law the court will not interfere to see whether any alteration or regulation which they may direct is good or bad ; if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, the court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals merely as people dealing with property without legal authority." (Frewin vs. Lewis, 1838, 4, M. Y. and C. R. at page 254.)

9. I do not wish to go further into the details relating to mandamus. They are discussed in all the leading text-books such as Bailey on Habeas Corpus, Volume II. At present I content myself with making the following suggestions :—

We may introduce a Bill to amend section 45 of the Specific Relief Act. I would add after the word " Bombay " the words " Allahabad, Patna, Lahore, and the Chief Court of Burma, and the Courts of Judicial Commissioners at Lucknow and at Karachi." I would delete also the words " within the local limits of its ordinary original civil jurisdiction," and if necessary substitute some other words so as to indicate that the jurisdic-

tion to make an order under this section is co-extensive with the limits of its appellate jurisdiction. Perhaps local Governments and High Courts will be consulted first.

II.

(22nd November, 1922.)

I have read the very interesting note of Mr. Tonkinson on the subject and such opinions as there are on the file. It is true as Mr. Tonkinson points out, that it is for the Home Department to consider questions of administrative policy ; but I feel that in meeting the objections which have been raised to this Bill, by the United Provinces Government and the Sind Judicial Commissioner, it is impossible for me to overlook the weight of opinion to the contrary.

2. To take Madras first, the Chief Justice of Madras is strongly in favour of the proposed amendment, and among the Judges who favour the amendment are Justices Ayling, Spenser, Trotter, Kumaraswami Sastri, Krishnan, Odgers, Ramesam, Devadoss and Rao.

3. The Bengal Government are of opinion that if a right to demand such a writ were granted to individuals outside the Presidency Towns, there would be a risk of undesirable litigation, which is to be deprecated. Writs of this character should, in their opinion, only be obtainable in special circumstances. On the other hand, they recognise that the existing state of the law is not satisfactory in so far as there are no satisfactory provisions existing whereby the local Government can compel a local body to perform its statutory duties or refrain from doing acts forbidden by law. The local Government, therefore, suggest that it is undesirable to give private individuals a right to such writs generally. There should be a power given to the local Government to apply for writs to compel any local body to perform its statutory duties or refrain from doing acts prohibited by law or spending public money on matters with which it is not, as a local body, concerned. Sir Abdul Rahim was unable to agree in the tenour of the reply of the Bengal Government, and he was decidedly of opinion that the amendment suggested by the Government of India was both desirable and necessary, as it would supply what is a clear omission in the law. Indeed, he supported the view that I put forward in my original note of the 17th November 1921, that while with the rapid development of local self-government in the country, the need for extension of a specific and adequate remedy such as is supplied by this section (*i.e.*, section 45 of the Specific Relief Act) is sure to be growingly felt, it is difficult to conceive how this need can be met except in the way suggested by the Government of India.

As regards the objection of the Bengal Government that there would be a risk of undesirable litigation if the right to demand such writs was given to individuals outside the Presidency Towns, I hold exactly the contrary view. As matters stand at present, frivolous and prolonged suits are filed and fought up to the High Court, and, such litigation could be nipped in the bud by the High Court if the remedy of mandamus is made available to private individuals.

4. The United Provinces Government, that is, the Governor in Council, say that there is no objection to the proposal in principle, but that in the present state of public feeling if these powers were conferred, advantage

might be taken of them to embarrass the administration. I shall deal with the question of embarrassing the administration separately.

5. The Punjab Government think that the extension of the powers in section 45 of the Specific Relief Act is desirable and that the safeguards mentioned are adequate. The Chief Justice, Sir Shadilal, was strongly in favour of the suggested amendment and thought that the safeguards suggested were adequate. Justices Scott-Smith, Raoof, Martineau, Harrison Abdul Qadir and Campbell were also in favour of the suggested amendment. Justice Broadway, however, saw no case for extension of the power, but held that if that power was extended, the proposed safeguards were sufficient ; and Justice Chevis agreed with him.

6. The Lieutenant Governor of Burma considered the proposal to be a very sound measure and supported it. The Judges of the Chief Court, Lower Burma and the Judicial Commissioner, Upper Burma, were all in favour of the proposed legislation and the extension of the limits of jurisdiction. They also considered the safeguards adequate.

7. The real opposition seems to have come from Mr. Kincaid, Judicial Commissioner of Sind, and Mr. Kennedy of the same Court but the other Judges of the Court of Sind, *i.e.*, Messrs. Raymond and Aston, favoured the proposal.

Mr. Kennedy thinks that with the cry of the separation of the Judicial and the Executive functions, there would be a desire for the subordination of the Executive to the Judiciary, and I infer from his note that he apprehends that the proposed amendment will injuriously affect the Executive.

Mr. Kincaid took even a more emphatic view of the question. He refers to some recent resolution introduced into the Council of State and the Legislative Assembly for the indianisation of Indian High Courts, and thinks that in no long time the Indian High Courts will be composed of Indian Barristers, Indian Pleaders, with probably a sprinkling of Mukhtars. I hardly think that Mr. Kincaid was serious when he talked of Mukhtars sitting on the High Court Bench. Probably India is capable of producing more qualified Judges than Mukhtars. He apprehends that such High Courts might well be bitterly malignant and hostile to the British administration and might readily use all the weapons at their command to hamper it and render it impotent. He then goes on very gravely to say that " to put in the hands of such bodies the power to issue writs of mandamus through the length and breadth of India would be to imperil the existence of the British Government ". I shall resist the temptation of using equally strong language, but shall content myself by saying that I have a better opinion of Indian Judges of High Courts, a better opinion altogether of their judicial balance, judicial conscience, and judicial character, and I do not expect that the scenes which were enacted in the Supreme Court in Calcutta during the time of Elijah Impey in relation to Warren Hastings are likely to be repeated even in a Swaraj Government. But if with the advent of complete responsible Government in India, Indian High Courts are Indianised, and if the further assumption is made that there will be no British servants in India in the Executive Department of the Government against whom the Indian Judges will be bitterly and malignantly hostile, then there will not be much of a peril to the existence of British Government in India. The danger of the argument of Mr. Kincaid is that he has mixed up politics with law. Mr. Kincaid in his note

refers to two Bombay cases one of which I had noticed in my original note, and to some English cases, to illustrate the purposes for which writs of mandamus have been issued in India and in England, and observes that these cases suffice to show what power for evil the right to ask for writs of mandamus broadcast would confer on factitious persons. With all respect to Mr. Kincaid, I decline to believe that anyone of those cases if they happened in India could be said to imperil the existence of British Government or any Government. Then Mr. Kincaid says that " the power for evil the proposed amendment of the law would confer on private individuals would be as nothing compared with the power for evil it would confer on rancorous or perverse Judges. Writs of mandamus would issue to Collectors not to prohibit public meetings, not to interfere with political movements, not to order the arrest of political offenders. It is all very well for the Government of India to rely on the limits to the issue of a mandamus laid down in section 45 of the Specific Relief Act. Those limits would simply be disregarded and the Judges in question would have excellent authority for disregarding them ". It would have been more satisfactory indeed if Mr. Kincaid had by a few more citations shown that these things had happened in some parts of India, or in some parts of England and America or that they could happen under the law as it stands. Of course, if we presume that our future Judges will be rancorous or perverse and that there are no perverse Judges in the present generation, we may also assume that they will be prepared to ignore the dictates of common sense and law and exercise their power rancorously and perversely. Happily, I am not prepared to make any such presumption. I have head the case of the Church-warden of All Saints, Wigan, in (a 876 I. Appeal Case, page 611), to which reference is made by Mr. Kincaid. He quotes the following sentences from the judgment of Lord Chelmsford :—

> " So in cases where the right, in respect of which a rule for a mandamus has been granted, upon showing cause appears to be doubtful, the Court frequently grants a mandamus in order that the right may be tried upon the return ; this is also a matter of discretion."

He might as well have quoted the succeeding sentence, which I shall quote below :—

> " But where the Judges grant a peremptory mandamus, which is a determination of the right, and not a mere dealing with the writ, they decided according to the merits of the case, and not upon their own discretion, and their judgment must be subject to review, as in every other decision in actions before them."

There is nothing in the case, therefore, which can frighten me, or for the matter of that, any lawyer as to the possibility of the abuse of this power.

8. I have considered the provisions of section 45 of the Specific Relief Act, and I confess that I am unable to see that it would be possible for a High Court to issue an order on a Magistrate having jurisdiction directing him not to prohibit a public meeting, or not to arrest a political offender. Of course, this rests on the assumption that judges of High Courts will bring a judicial frame of mind to bear upon their work and apply the well established principles of construction, and to follow authoritative precedents, and not to give vent to their rancour and perversity.

9. As regards the servants of the Crown, there is no doubt (as my Hon'ble Colleague, Sir William Vincent, points out) that section 106 (2) and section 110 of the Government of India Act impose certain limitations on the powers of the High Courts to exercise original jurisdiction in any matter concerning revenue and in respect of certain other officers defined in the latter section. But it seems to me that the whole basis of the criticism is that the High Courts will not be so sensible or so judicious or impartial as the present day High Courts are. This is an assumption which I frankly confess I am not prepared to make.

I have consulted the leading Indian books on the subject, namely, Banerjee's Specific Relief and also Bailey's book on Habeas Corpus, which latter exhaustively deals with mandamus, and I have not come across any such cases as are contemplated by Mr. Kincaid. The principles on which writs of mandamus are granted or refused are well-known. It may be that in the application of those principles Judges may differ ; but that is inevitable in the case of human Judges. Writs of mandamus have been issued in America for the enforcement of criminal law, compelling a municipal Judge to issue his warrant for the arrest of one properly charged with the commission of crime, or commanding police officers and marshalls to prosecute persons offending against the laws ; but I have not come across cases in which writs have been issued preventing the police from doing their ordinary duty or the Magistrate (having jurisdiction) from directing the arrest of any offender.

10. So far as the English procedure relating to mandamus is concerned, I think it has been very clearly and exhaustively dealt with in his note by Mr. Tonkinson, and it is not necessary for me to cover the same ground. I agree with his remarks in paragraph 4 that the Indian law in Chapter VIII of the Specific Relief Act is in a large measure intended to reproduce English law. The Indian procedure is summarised in section 46 of the Specific Relief Act : (1) the application is to be founded on an affidavit of the person injured ; (2) it must state his right in the matter in question, his demand of justice and the denial thereof ; (3) the High Court may then in its *discretion* make the order applied for absolute in the first instance (which implies that it is not bound to make a peremptory order on the application being made) or it may refuse it or grant a rule to show cause why the order applied for should not be made. The section then goes on to say that where a rule is granted and the person, court or corporation shows no sufficient cause, the High Court may first make an order in the alternative either to do or forbear the act mentioned in the order ; or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf. It is quite clear that when such person, court or corporation, to whom or to which such order is directed, makes no answer or makes an insufficient or a false answer, the High Court may *then* issue a peremptory order either to do or forbear the act absolutely. Under section 46, the High Court may, as already pointed out, in its discretion make the order applied for absolute in the first instance ; but it must be borne in mind that this extreme step can only be taken by the High Court in very rare cases. To quote Bailey, Volume II, page 804 :—

> " The general and inflexible rule is that a peremptory writ of mandamus will only issue where there is a specific legal right to be enforced, or a positive duty to be performed *and there is no other legal remedy.*

And has held on some cases, that the facts upon which the right is based should be undisputed."

(Judicial Department, September 1920, No. 13.)

It has been held by the Calcutta High Court in the case of Board of Examiners *versus* Provas (I.L.R.-40, Cal., page 588) that the procedure prescribed in these sections, having been borrowed from English practice, the High Court generally will follow the principles applicable to the writ of mandamus in England.* According to my reading of section 46, there are three things which the High Court may in its discretion do when an application under section 45 is made to it—(1) it may make the order applied for absolute in the first instance, or (2) it may refuse it, or (3) it may grant a rule to show cause why the order applied for should not be made. Assuming that it has issued a rule under section 46, and then the person, court or corporation to whom or to which such rule has been issued, makes no answer or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely. Even then under section 46 the High Court may first make an order in the alternative either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf. I do not dispute that under section 46 a High Court makes the order applied for absolute in the first instance, but although the High Courts possess this power, yet I venture to think that it will not lightly exercise such a power. Ordinarily a Judge would, except for very grave reasons of urgency, give the opposite party a chance to show cause before making an absolute order. If, however, some danger is apprehended, I have no objection to the amendment of the second paragraph of section 46 being made on the lines suggested by Mr. Tonkinson.

11. As regards the rules which have been framed under section 51 of the Specific Relief Act, those rules have been framed by the Presidency High Courts for the local limits of their ordinary civil jurisdiction, and I think that, if the powers of the High Courts are generally extended so as to make it lawful for them to issue writs in the nature of a mandamus all over the territory within their appellate jurisdiction, I have no doubt that the High Courts will themselves modify the rule so as to provide for adequate time for showing cause.

Personally, I have no doubt that the High Courts will make ample provision for time being given to show cause, in those cases in which writs are issued into the interior. At the same time, I have no objection to their making rules on the lines of section 107 of the Government of India Act, that is to say, the rules, as suggested by Mr. Tonkinson, should require the previous approval of, in the case of High Courts, the Governor General in Council ; and in the case of other courts, of local Governments.

I have considered clauses (*b*), (*d*) and (*g*) of section 45 of the Specific Relief Act, and personally speaking I do not think there is much room for improvement of the language of those clauses. These clauses, to my mind, embody certain general principles and their application to any particular case must depend upon the facts of that case.

12. I would refer to pages 538-539 of Banerji's Lectures on Specific Relief, where he refers to cases which have taken place in India in which applications have been made for writs in the nature of a mandamus. In paragraph 7 of his note, Mr. Tonkinson refers to the possibility of a

mandamus being issued to a District Magistrate to forbear from issuing an order prohibiting a public meeting under section 5 of the Seditious Meetings Act ; and a mandamus being issued to a District Superintendent of Police to issue a license for a procession without conditions or without any particular condition. As regards public meetings, I doubt very much whether an application like this could be entertained under section 45. If the Magistrate has jurisdiction to prohibit a public meeting under the Seditious Meetings Act or section 144, Criminal Procedure Code, then, I think, no High Court will issue a mandamus. If he has no jurisdiction to issue an order under section 144, then, even as the law stands, the High Court can interfere. Clause (*a*) requires that the application must be made by some person whose property, franchise or personal right would be injured by the forbearing or doing of " the said specific act ". I do not think, in a case like this, it could be said that the personal right of any individual would be injured. The expression " personal right " there, to my mind, could not admit of a very wide interpretation. Similarly, it seems to me that clause (*b*) would not have much application to a case like this, and I doubt whether any High Court would be prepared to hold that the issuing of a prohibitory notice or the forbearing to issue such a notice was consonant to right and justice.

No. 42.

Memorials from Lal Har Prasad Singh Deo and Bhaiya Sheo Prasad Singh Deo, re : mineral rights on their estates in Sirguja State, C. P.

(24th November, 1921).

(Legislative Department unofficial No. 65½ of 1923).

This case has arisen out of representations made to His Excellency the Viceroy by two persons, namely, Lal Harprasad Singh Deo, Khorposhdar of Tappas Rampur and Mahiri in the Sirguja State, and of Bhaiya Sheo Prasad Singh Deo, Ilaqadar of Tappa Jhilmili in the same state. In point of fact there is no substantial difference between the case of the one and that of the other so far as the main issue is concerned. I shall, however, later on show such difference as is pointed out by the memorialists, though, as I have already said, in my opinion for the purposes of deciding the two cases, that difference, even if it be real, does not matter at all.

2. It would perhaps be more convenient at this stage to state briefly the facts and history of the two cases. I shall take up the case of Lal Harprasad Singh Deo first. Sirguja State is a Feudatory State which at one time was within the jurisdiction of the Government of Bengal but appears to have been transferred to the Central Provinces Administration some time in 1905. The present Chief of the State is Maharaja Ramanuj Saran Singh Deo, C.B E. He is third in descent from Maharaja Amar Singh Deo. The memorialist Lal Harprasad Singh Deo is also the 3rd in descent from Lal Bahadur Bisheshar Bux, who was the younger brother of Maharaja Amar Singh Deo. The original *sanad* which was granted by the British Government to Raja Amar Singh bears date the 24th of June 1820 and is printed at page 468 of Aitchison's Treaties, Vol. I. On the 24th of February 1825 a *patta* was granted by the Government to Raja Amar Singh in respect of the pargana of Sirguja for a period of five years from 1232 to 1326 Fusli, the Raja undertaking to pay to the Government Rs. 3,001 annually. This settlement appears to have been allowed to stand up to the year 1876, when it was renewed for another period of twenty years, commencing from the 12th of April 1875 to the 11th of April 1895 [*vide* the *sanad* bearing the signature of the Commissioner (W. LeF. Robinson) of Chhota-Nagpur, dated the 9th February 1876 in Aitchison's Treaties, Vol. I, page 470]. What happened in 1895 or thereafter, I cannot say, as there is no reference to any further *sanad* renewing the settlement. But when the State was transferred from the Bengal Government to the Central Provinces Administration in 1905, a fresh *sanad* appears to have been granted by Lord Minto on the 23rd of December 1905, by which the Maharaja was required during the next fourteen years to pay a tribute of Rs. 2,500. (*Vide* the *sanad* at page 471, *ibid.*) It will thus appear without doubt that from 1820 right up to now (that is to say, for a period of 100 years) Maharaja Amar Singh and his descendants have been recognised as the Feudatory Chiefs of Sirguja, subject to the payment of certain tributes.

3. Maharaja Amar Singh Deo appears to have granted to his younger brother, Lal Bahadur Bisheshar Bux, a *patta* of two Tappas in the State, *i.e.*, Mahiri and Rampur, which *patta* was executed two years after his accession to the *gaddi*. The *patta* is described as *muquarrari istimarari*

mandamus being issued to a District Magistrate to forbear from issuing an order prohibiting a public meeting under section 5 of the Seditious Meetings Act ; and a mandamus being issued to a District Superintendent of Police to issue a license for a procession without conditions or without any particular condition. As regards public meetings, I doubt very much whether an application like this could be entertained under section 45. If the Magistrate has jurisdiction to prohibit a public meeting under the Seditious Meetings Act or section 144, Criminal Procedure Code, then, I think, no High Court will issue a mandamus. If he has no jurisdiction to issue an order under section 144, then, even as the law stands, the High Court can interfere. Clause (*a*) requires that the application must be made by some person whose property, franchise or personal right would be injured by the forbearing or doing of " the said specific act ". I do not think, in a case like this, it could be said that the personal right of any individual would be injured. The expression " personal right " there, to my mind, could not admit of a very wide interpretation. Similarly, it seems to me that clause (*b*) would not have much application to a case like this, and I doubt whether any High Court would be prepared to hold that the issuing of a prohibitory notice or the forbearing to issue such a notice was consonant to right and justice.

No. 42.

Memorials from Lal Har Prasad Singh Deo and Bhaiya Sheo Prasad Singh Deo, re : mineral rights on their estates in Sirguja State, C. P.

(24th November, 1921).

(Legislative Department unofficial No. 65½ of 1923).

This case has arisen out of representations made to His Excellency the Viceroy by two persons, namely, Lal Harprasad Singh Deo, Khorposhdar of Tappas Rampur and Mahiri in the Sirguja State, and of Bhaiya Sheo Prasad Singh Deo, Ilaqadar of Tappa Jhilmili in the same state. In point of fact there is no substantial difference between the case of the one and that of the other so far as the main issue is concerned. I shall, however, later on show such difference as is pointed out by the memorialists, though, as I have already said, in my opinion for the purposes of deciding the two cases, that difference, even if it be real, does not matter at all.

2. It would perhaps be more convenient at this stage to state briefly the facts and history of the two cases. I shall take up the case of Lal Harprasad Singh Deo first. Sirguja State is a Feudatory State which at one time was within the jurisdiction of the Government of Bengal but appears to have been transferred to the Central Provinces Administration some time in 1905. The present Chief of the State is Maharaja Ramanuj Saran Singh Deo, C.B E. He is third in descent from Maharaja Amar Singh Deo. The memorialist Lal Harprasad Singh Deo is also the 3rd in descent from Lal Bahadur Bisheshar Bux, who was the younger brother of Maharaja Amar Singh Deo. The original *sanad* which was granted by the British Government to Raja Amar Singh bears date the 24th of June 1820 and is printed at page 468 of Aitchison's Treaties, Vol. I. On the 24th of February 1825 a *patta* was granted by the Government to Raja Amar Singh in respect of the pargana of Sirguja for a period of five years from 1232 to 1326 Fusli, the Raja undertaking to pay to the Government Rs. 3,001 annually. This settlement appears to have been allowed to stand up to the year 1876, when it was renewed for another period of twenty years, commencing from the 12th of April 1875 to the 11th of April 1895 [*vide* the *sanad* bearing the signature of the Commissioner (W. LeF. Robinson) of Chhota-Nagpur, dated the 9th February 1876 in Aitchison's Treaties, Vol. I, page 470]. What happened in 1895 or thereafter, I cannot say, as there is no reference to any further *sanad* renewing the settlement. But when the State was transferred from the Bengal Government to the Central Provinces Administration in 1905, a fresh *sanad* appears to have been granted by Lord Minto on the 23rd of December 1905, by which the Maharaja was required during the next fourteen years to pay a tribute of Rs. 2,500. (*Vide* the *sanad* at page 471, *ibid.*) It will thus appear without doubt that from 1820 right up to now (that is to say, for a period of 100 years) Maharaja Amar Singh and his descendants have been recognised as the Feudatory Chiefs of Sirguja, subject to the payment of certain tributes.

3. Maharaja Amar Singh Deo appears to have granted to his younger brother, Lal Bahadur Bisheshar Bux, a *patta* of two Tappas in the State, *i.e.*, Mahiri and Rampur, which *patta* was executed two years after his accession to the *gaddi*. The *patta* is described as *muquarrari istimarari*

bafarzandan, that is to say, a lease in perpetuity from generation to generation, and the object of this *patta* was to provide for the maintenance of the junior brother. *Pattas* or grants of this description are very frequent in India, both among the Ruling Chiefs and among Rajas who are merely zamindars. These maintenance grants are called by various names in various parts of the country ; but there is no doubt that they are heritable grants. Whether they are liable to resumption in certain eventualities is a question which cannot be answered generally irrespective of the facts relating to each grant. Some stress has been laid upon the fact that the grant in question is liable to resumption in certain circumstances ; but having regard to the main issue in this case, I do not think that it is necessary for me to express any opinion on this question or for the Government to give any ruling on it.

4. I shall now come to the real issue in this case. The claim of the memorialist is that he is entitled to all the mineral rights in the land which he holds under the grant made by Maharaja Amar Singh Deo. He has put forward his case at great length in the memorial which he submitted to His Excellency the Viceroy on the 3rd February 1920. When the case came up first, it was disposed of by a letter from the Foreign and Political Department, to the Chief Commissioner, Central Provinces, dated the 13th December, 1920. The decision of the Government of India then was that the memorialist did not prove his claim to the sole right in the minerals in his estate, and that on the other hand there appeared to be no evidence on record to show what, if any, mineral rights in his estate were reserved to the Chief of the Sirguja State. The Government of India decided that in the absence of any definite evidence either way, the most equitable solution of the case would be to follow the precedent in the Gangpur case ; and the Chief Commissioner was required to communicate this decision, if he saw no strong objection, to the memorialist. Now the decision in the Gangpur case related to certain coal concessions in the estate of Hemgir which was within the Native State of Gangpur also in the Chhota-Nagpur division of the Bengal Government. The facts of that case appear from the order of Mr. Forbes, the then Commissioner of Chhota-Nagpur, dated the 22nd of November, 1900, and it is not necessary for me to recapitulate them here. But it appears to have been decided in that case that the Chief of the State was entitled to 3-5ths and the Zamindar within whose land the coal mine in question was situated was entitled to 2-5ths of the share of royalty. This decision, as appears from a perusal of the order of Mr. Forbes, was based, in the absence of any settled law and proved custom, on general principles of equity and considerations of policy. The Central Provinces Government have now addressed the Government of India, drawing their attention to some further considerations in their letter of the 6th September 1921. They ask the Government of India to review their former decision and to hold that the right to minerals should be considered to belong to the Feudatory Chief to the exclusion of the memorialists.

5. I have gone through the printed records carefully. It seems to me that if the question had to be decided by a court of law, many of the considerations which have been urged by the memorialist on the one side and by the Central Provinces Government on the other, would be ruled out as being more or less irrelevant to the main issue in the case. The first question, and indeed it seems to me to be the only question, which a

court of law would have to consider in a case of this character, would be with regard to the interpretation of the grants in favour of the memorialists. In the *patta* or grant which was made by Maharaja Amar Singh in favour of the memorialist's ancestor, Lal Bahadur Bisheshar Bux Deo, for his maintenance, there is no reference whatsoever to mines or minerals. On the one hand it is contended by the memorialist that inasmuch as there was no reservation of mines and minerals, it must be presumed that the grant included the right to mines and minerals. On the other hand, it is contended by the Maharaja that the absence of any words of grant to mines and minerals shows that only surface rights were granted and that the mines and minerals were reserved or excepted by the State. I do not think it is necessary in this case to enter into the larger question which has been touched upon in the papers before me, as to whether mines and minerals belong to the Crown in India. Nor do I think it is necessary to make out a distinction between the position of Zamindars in Bengal and grantees like the memorialists in a Native State. It seems to me that the attempt which has been made to make out this distinction has been due to an ignorance of recent decisions of their Lordships of the Privy Council in cases which have gone there from Bengal itself. After having studied these cases carefully, the view that I have come to entertain is that the position taken by the Maharaja is legally sound, and that the doctrine that the land includes everything from the middle of the earth to heaven has no application whatever to the circumstances of this case. I refrain from referring to decisions in English cases on this point as, having regard to the nature of these grants in India, it is not always safe to rely upon English analogies. The first of these Privy Council cases to which I will refer is reported in I. L. R., Calcutta XXXVII, 1910, page 723, Hari Narayan Singh Deo, *v.* Sriram Chakravarti. It was a case which went to the Privy Council from Bengal. It appears that in this case a transaction took place whereby the plaintiff's predecessor appropriated to a certain Hindu idol, of whom certain persons known as Goswamis were appointed *shebaits* or priests, an interest of some sort in the village of Petena, at an annual rental of Rs. 22-15-6. The defendants in the case claimed to hold a lease from the *shebaits* or priests and wanted to work the mines. There was no evidence whatever that a Zamindar Raja had ever granted mineral rights in the said village to the Goswamis or any other person. Upon these facts Lord Collins giving the judgment of the Privy Council held as follows :—

> " On the whole, it seems to their Lordships that the title of the Zamindar Raja to the village Petena as part of his Zamindari before the arrival of the Goswamis on the scene being established, as it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced."

The question again was considered by their Lordships of the Privy Council in two cases which are reported in XLIV Indian Appeals, 1916-17, at pages 46 and 246 respectively. In the former case, after reviewing the earlier decision, Lord Chancellor Buckmaster held that—

> " When a grant is made by a Zamindar of a tenure at a fixed rent, although the tenure may be permanent heritable and transferable, minerals will not be held to have formed part of the grant in the absence of an express evidence to that effect."

(Sashi Bhushan Misra, *v.* Jyoti Prashad Singh Deo).

In the latter case, Girdhari Singh, *v.* Megh Lal Pandey a Zamindar in the Manbhoom district, executed a *mukarrari patta* of a small portion of a village with "all rights." Subsequently minerals were discovered below the surface of the land which was the subject of the *mukarrari patta* and the lessee began to work them according to the *mukarrari* deed. Lord Shaw in delivering his judgment of the Privy Council observed as follows :—

> "On the general question, accordingly, one need not proceed further to consider the suggestion that the lessee in a *mukarrari pattah* has a right to the minerals by reason of the nature of such a grant. Such a suggestion stands negatived upon authority."

Further on his Lordship observed as follows :—

> "It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the *corpus* of which does not, in the nature of things and by reason of the user, disappear. In order to cause the latter speciality to arise, minerals must be expressly denominated, so as thus to permit the idea of partial consumption of the subject leased."

6. In a still later case decided by their Lordships of the Privy Council in 1919 (Raghunath Roy Marwari, *v.* Raja Durga Prasad Singh, reported in XXIII Calcutta, Weekly Notes), Sir John Edge in delivering the judgment laid down the law as follows :—

> "Where a Zamindar grants a tenure in lands within his Zamindari and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee."

Incidentally, it may be noticed that in this case the Privy Council expressed their approval of an earlier decision of Sir Lawrence Jenkins, in which he pointed out (I. L. R. XXIV, Calcutta, page 447) that in India—

> "A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own, and does not annihilate his own interest."

7. There is only one more decision of the Privy Council to which I shall refer, and that is an earlier decision reported in I. L. R., Calcutta, 1906, Vol. XXXIII, page 203. (Tituram *vs.* Cohen). It is helpful in so far as the grantee in that case had got the grant for his *Khorposh* just as in the case of the memorialist, and by virtue of that grant he claimed a right to open mines and remove the minerals which were a portion of the soil. Their Lordships of the Privy Council held that his grant could not be presumed to be more than a grant of rents and profits, and could not be presumed to give him the right to work mines and remove minerals.

There have been a number of decisions in the Patna High Court in recent years, and all those decisions have laid down that when under the terms of a *mukarrari* lease the lessee was entitled to enjoy the land from generation to generation with power of a gift or sale without any express

grant of a sub-soil right, he was entitled to surface rights only and not to the minerals underneath. (See for instance Vol. V, Patna Law Journal, page 273, per Dawson Miller, C. J. and Coutts, J., and also page 563 per Jwala Pershad, J. and Admmi, J.).

8. As I have shown above, Sirguja was up to 1905 under the Bengal Government, probably being a part of the Chhota-Nagpur Division. If it were not a Native State but an ordinary Zamindari subject to the jurisdiction of our courts, I have no doubt that the decisions which I have quoted above from Bengal and Bihar would fully cover a case of this character. In short, upon a consideration of these authorities it seems to me that the grant made in favour of the memorialist's ancestors cannot be taken to have carried with it the right to work mines or minerals.

9. I shall now deal with some special considerations which have been urged by the memorialist in support of his case. He first relies on a judgment of Mr. Harrington, Commissioner of Chhota-Nagpur, dated the 7th April 1851, in a case which related to a village in Kharsawan, which had nothing to do with the present estate. The Commissioner simply expressed an opinion there that the Khorposhdars held in perpetuity and it seemed reasonable that they should have the right in so common a product as iron and that in his opinion the evidence of witnesses established that by the actual custom of the country they had such rights. It will be noticed that the Commissioner's view, so far as it is based on law, cannot be supported now in the light of the Privy Council's decisions, and that, so far as it is based on custom, it is much too widely worded. He speaks of the actual custom of the country. I do not know what he meant by the expression "country." It is possible that there may be a custom to that effect in one estate and it may not exist in another estate even though it may be a neighbouring estate. I confess that I am not much impressed by this judgment or its value as an evidence in this case

The next important documents on which reliance is placed by the other memorialist in particular (but which may also be referred to in disposing of the case of Lal Harprasad Singh Deo) is an order of Mr. Grimley, the Commissioner, dated the 22nd August, 1890. By that order he directed that as many companies, capitalists, traders, etc, were likely to come to the Political States of that division in order to take contract of mines, it was necessary to write to all the Rajas, Zamindars and maintenance-holders of *Ilaqas* that should any company or other person wish to make any sort of settlement with them, they should not make any sort of settlement without his previous opinion and sanction. Now the argument is that the Commissioner did recognise by this order the right of the maintenance-holders to grant leases. I should not attach much importance to a general order of this character when it was indiscriminately addressed to all the Rajas, Zamindars and maintenance-holders, though, if there were other evidence in support of the memorialist's claim, I might have attached some importance to it.

10. In their present letter No. C.-423-319-N., dated the 6th September, 1921, the Central Provinces Government lay stress upon the fact that the status of the estate-holders in Sirguja is entirely different from that of the Zamindars in Bengal. As I have shown above, this apparent distinction is, to my mind, wholly immaterial for the purposes of a decision in this case. They have also pointed out in their letter that both the memorialists claim that coal had been extracted, and that the fact of their

having collected certain dues was an exercise of the right to minerals. The evidence with regard to the collection of these dues is not before me, and I am unable to come to any independent conclusion. But having considered the arguments of the Central Provinces Government in the second paragraph of their letter I am inclined to agree generally with the view which they have taken ; but assuming that the memorialists have proved that they had collected dues from melters, blacksmiths, or from the purchasers of iron at markets, I do not think that this evidence is by any means conclusive in their favour. It appears that the Ilaqadar of Jhilmili that is to say, the other memorialist, also claimed that coal had been extracted for his personal use on many occasions for burning bricks for the construction of his house, and he also produced what purports to be a lease for the extraction of lead granted by a former Ilaqadar of Ramkola whose estate has since been resumed. As regards the personal use of coal by the Ilaqadar of Jhilmili, the Central Provinces Government say that this was only surface coal and that in the year 1914 and subsequently the Feudatory Chief objected to and tried to prevent its use by the Ilaqadar. As regards the lease by the Ilaqadar of Ramkola, the Central Provinces Government were not satisfied with the genuine character of this lease, and felt that lead mines had not really been worked and that therefore they attached no value to it.

As regards the other memorialist, the only difference between his case and the case of Lal Harprasad Singh Deo is that the former holds the lease or *patta* for his past services, while the latter was granted this *patta* for his maintenance. I do not think that this difference at all affects the decision, and the arguments which apply in the case of Lal Harprasad Singh Deo seem to me also to apply to the case of the Ilaqadar of Jhilmili.

11. I have therefore come to the conclusion that the memorialists have failed to prove that they have any right to the mines or minerals in their respective estates. The former order of the Government of India which was based on the Gangpur case purported to divide the royalty between the Chief and these memorialists in certain proportions. Upon a strict legal view, I do not think that these memorialists have any title to the mines or minerals. The Gangpur case was based not on any rule of law but almost wholly on considerations of policy and equity. I do not attack its equitable character but if we are to proceed in these two cases upon a strictly legal view of the matter, I do not think that we can help the memorialists at all. I therefore agree with the conclusions of the Central Provinces Government in their present letter, though my reasons for arriving at this conclusion are somewhat different from those of that Government.

No. 43.

Question of the continuance of the issue of certificates of naturalisation under the Indian Naturalisation Act, 1852.

(30th November, 1921.)

(Legislative Department unofficial No. 697 of 1921).

Under section 2 of the British Nationality and Status of Aliens Act, 1914, it is necessary that an alien, who makes an application for a certificate of naturalisation to the Secretary of State, should satisfy him that he is of good character and has an adequate knowledge of the English language. Under section 8 of the Act, the Government of any British possession may similarly grant a certificate to an alien, substituting any language which is recognised as on an equality with the English language. I agree with Mr. Graham in thinking that for many purposes the leading vernaculars are on an equality with English in this country, and I see absolutely no reason why in every case we must insist upon an applicant showing that he has an adequate knowledge of the English language, when he may equally be in a position to show that he has an adequate knowledge of some leading vernacular.

2. On the second point relating to children, I must say that the law is in an extremely unsatisfactory condition. As regards children born before naturalization, the Indian Act of 1852 is, as pointed out by Mr. Graham, silent, and that probably because, as he points out, the English law too at that time was silent. It was the English Act of 1870 by which the minor children of a naturalised father acquired the nationality of their father by reason of their residing with him during their minority in any part of the United Kingdom. The law on the subject is discussed at some length in Sir Frederick Smith's (Lord Birkenhead's) book on International Law, chapter 3. It is interesting to note from it that the practice varies in various parts of Europe. In Sweden, children of aliens born in Sweden become Swedish if they are domiciled in the country till the age of 22. Austria, Germany, Denmark, Greece, Norway and Switzerland determine national character by reference to the father's nationality. Russian practice appears to be similar, with the addition that all persons born and bred on Russian soil are entitled to claim Russian nationality whatever their parentage. In Italy, the principle of free choice by the children prevails, but they are Italian subjects when the father has been domiciled in the country for ten years unless they elect to the contrary. In France, every child born in France is to be deemed a French citizen unless he has made a declaration of alienage in the year following the attainment of his majority. Personally, I think that the rule which we should adopt is the English rule which is now embodied in section 5 of the English Act of 1914, the effect of which is that the Secretary of State may, if he thinks fit, on the application of an alien, include in the certificate the name of any child of the alien born *before* the date of the certificate and being a minor. It gives the child the right to make a declaration of alienage within one year after attaining his majority. In my opinion, much will depend upon how the naturalization of the father has taken place, when the child is born after the naturalization of its father. If the father has been naturalized under the English Act, I do not think that there can be any serious doubt as to the status of his child who is born within British Dominions after his naturalization. But if the

naturalization was under a local Act like the Indian Act of 1852 (then having regard to the provisions of the Indian Act), I am not prepared to say that such a child would necessarily be treated as a British born subject outside British India.

3. In the end, I wish only to express my opinion that the Indian Act of 1852 seems to me to be very much out of date, and in certain material respects it is very much behind the present developments of the naturalization law. I think that if we are not prepared for some administrative reasons to adopt the English Act in its entirety, we must base our Act as far as possible on that Act, and in any case I think there seems to me to be a need for insistence upon a period of residence in British India. Perhaps, I may add that I agree with Mr. Tonkinson in the suggestion that the powers under the Act should be exercisable only by the central Government. The advantages of the central Government having to deal with cases of aliens are obvious, and I do not wish to say more.

L149LD

No. 44.

Political agitation in Administered Areas against Ruling Princes and Chiefs. (Application of Section 124-A. of the Indian Penal Code to Indian Princes).

(6th December, 1921.)

(Legislative Department unofficial No. 560 of 1921).

*Notes, pages 6-7.

At the outset I must say that I feel considerable difficulty in writing a note on this subject owing to the vagueness of the proposal. It will appear from my note of the* 26th September, 1921, that in my opinion section 124-A. of the Indian Penal Code could be made applicable for the protection of the Princes to the areas in which Agency Courts exercised jurisdiction, and that for those areas, section 124-A. of the Indian Penal Code would have to be modified so as to make it applicable to Indian Princes. But this is a small remedy, and from the nature of things it can have a limited application. I presume that it is now proposed to have a substantive section in the Indian Penal Code for the protection of Indian Princes more or less on the lines of section 124-A. It is on this assumption that I shall now proceed to discuss the subject. Having given the matter my most careful consideration, I regret that I am unable to support the proposal for more reasons than one. It seems to me that there are legal difficulties to be surmounted. But quite apart from legal difficulties, there are, to my mind, political considerations of a weighty character, which make it undesirable that we should extend the scope of the law of sedition to the extent to which it is proposed to do it. Assuming that we have another section, 124-B., in the Indian Penal Code with the words " an Indian Prince or the Government established by law in a Native State ", in place of " His Majesty or the Government established by law in British India ", I find it difficult to work out the various explanations attached to section 124-A., which I presume will also have to be attached to the new section. Under section 124-A., the expression " disaffection " includes " disloyalty and all feelings of enmity ". A British Indian subject is bound to be loyal to His Majesty. I do not think that there is any legal or political obligation on him to be loyal to an Indian Prince or Ruler of an Indian State. As I understand the law, loyalty and allegiance go together, and it seems to me hard for a British Indian subject to be accused of disloyalty towards an Indian ruler. The fact of the matter is that the law of sedition, as it is incorporated in section 124-A , is much wider in its scope than the English law. We can work it successfully in British India as against British Indian subjects. But it seems to me that if once we extend it so as to punish British Indian subjects for what is called sedition under the Indian Penal Code in relation to Indian States, we shall have to face enormous difficulties. Even in British India, the expression " Government established by law in British India " has given rise to a considerable amount of discussion not always very illuminating. For instance, in the well-known case of Tilak, Mr. Justice Batchelor held that " the Government established by law acts through human agency, and admittedly the Civil Service is the principal agency for the administration of the country in times of peace. Therefore, when you criticise the Civil Service *en bloc,* the question whether you excite disaffection against the Government or not, seems to be a pure question of

fact." It would be interesting to wait and watch what the effect of partial responsibility in provinces, or full responsibility later on, will be on the legal interpretation of this phrase in section 124-A. In most of the Native States, however, it is impossible to differentiate between the ruler and his Government. Any strong criticism of any measure of the Government of that State can easily be construed into a personal attack on the ruler himself. It would thus seem that the safeguards provided by section 124-A., which might operate in the case of an accused person who was prosecuted under section 124-A., would be practically illusory in the case of a person who would be prosecuted for the offence of sedition in relation to a Native State. It is true that under section 196 of the Code of Criminal Procedure a Court cannot take cognizance of any offence punishable under section 124-A., except upon a complaint made by an order of or under authority from the Governor General in Council, the Local Government, or some officer empowered by the Governor General in Council in this behalf. I presume that prosecution under the proposed law would also require the previous sanction of some competent authority. But this, to my mind, is not enough to meet the difficulties which will arise after the prosecution has been launched. I may further point out that once a prosecution has been launched, it would be impossible to rule out all discussion of the administration of the particular State in whose interest it might have been started, and I do not know whether Native States would like this procedure. Nor could the standard of evidence, or the extent of permissible criticism, be different in the case of an Indian State from that which applies to cases under section 124-A., and it is conceivable that with their different notions of judicial evidence and trials, and also of prestige and *izzat*, Indian rulers and States may have to face a situation in which the remedy provided may appear to them to be worse than the evil which it was meant to cure.

2. Coming now to the political consideration, while I am fully conscious of the great political value of the loyalty of the Native States, I am afraid that I cannot allow this to be the decisive factor in my mind. In the first place, I am not at all sure that the evil against which it is intended to provide is not very much exaggerated. It is not frequently that one comes across any scathing criticism of Native States. In the next place, it seems to me that Native States have effective means in their power of stopping the circulation of such offensive matter within their own jurisdiction. We ought not also to lose sight of the fact that with their autocratic traditions and view of government, criticism which would not be treated as sedition in British India would easily be looked upon as sedition by Indian rulers and their subordinates. Nothing is further from my desire than to be unjust and unfair to these States. But I am bound to point out that their methods of administration, with the exception of a few, are, if not altogether mediæval, very much behind the times. It is very seldom that the personal conduct of a ruler forms the subject of an attack in the Indian press. More often than not it is acts amounting to denial of justice and high-handedness of the subordinates which attract strong criticism. One certain line of criticism against the proposed measure will be that, while we are anxious to protect the princes, we are not affording an equal measure of protection to their subjects against their mis-rule ; and I cannot expect that the Legislative Assembly will agree to the proposed amendment of the law. Undoubtedly, the Princes are entitled to protection against foreign aggression or against any attempt

made in British India to foment revolution or rebellion within their States. And if definite legislation is undertaken to protect them against attempts made in British India to foment rebellion or disorder in their States, I should not object to such a legislation. But there I must draw the line. There is no indigenous press worth the name in Native States ; and I do not anticipate that for years to come they will allow a free press to grow up within their jurisdiction. The only means of ventilating their grievances available to their subjects is by approaching the press in British India. Although it is undoubtedly true that some unscrupulous journalists in British India who interest themselves in the affairs of Native States, overstep the limits of legitimate criticism, yet it seems to me that the danger of enacting a law, such as it is proposed to enact, is far greater than the evil which it is sought to remedy.

3. Lastly—and I do not wish to lay more stress than is necessary on this—it is a fact that a great many subjects of Native States go to big towns like Calcutta, Bombay and Cawnpore for purposes of trade, and it is notorious that in recent years much of the sinews of war have been supplied by these men. Some of them have taken a leading part in agitation against the British Government ; but I am not aware that any strong steps have been taken by the rulers of these States to protect us from the sedition to which their subjects are either direct or indirect parties. For all these reasons I very much regret that I am not in favour of the proposed legislation, excepting in so far as it may seek to give protection to the Princes and States against actual attempt at rebellion or civil disorder in their States.

No. 45.

(I-II)

Question whether the Punjab Government are competent to prohibit the import of any excisable article under the Punjab Excise Act, 1914, as amended by the Devolution Act, 1920. (Scope of rule 49 of the Devolution Rules.)

I

(7th December, 1921.)

(Legislative Department unofficial No. 722 of 1921).

The words ' with the previous sanction of the Governor General in Council ' have been deleted from Sections 4 and 17 of the Punjab Excise Act, 1914, by virtue of the Devolution Act, 1920. It would therefore be competent to the Local Government to prohibit ' the import of any excisable article ' into the Punjab. The Baroda-made spirit is such an excisable article within the meaning of the definitions of the words ' excisable article ' and liquor [S. 3 (6) and (14)]. See also S. 16 and 31 of the Punjab Act.

2. I do not think Section 80-A (3) (*b*) of the Government of India Act has much to do with the point at issue. It would apply where the local legislature wanted to make without the previous sanction of the Governor General any law affecting the customs duties for the time being in force and imposed by the Governor General in Council for the general purposes of the Government of India. The Punjab Legislature does not propose to make such law. The law is there already and the Local Government is exercising or seeking to exercise certain power under it.

3. The limits of the powers of superintendence, direction and control to be exercised by the Government of India in relation to transferred subjects are defined by rule 49 of the Devolution Rules and I agree with Mr. Graham in holding that the prohibition of imports of the Baroda-made spirit into the Punjab cannot amount to an interference with the administration of the central subject of customs so as to justify the Governor General in Council to interfere under Rule 49 (1).

II.

(11th January, 1922.)

With all respect to my Hon'ble Colleague Mr. Innes, I regret I am unable to modify my original opinion. I have carefully considered the last portion of his note, but I cannot see any valid reason in law in putting a large meaning upon the word administration in rule 49 (*i*). It is not difficult to conceive that the action of a minister of Education or Public Health may affect some central subject indirectly but the point is whether it was intended to use the word administration in such a large sense. If that were so, I think this power of interference could be used with great freedom in the name of safeguarding the administration of a central subject. Personally I think that as a matter of interpretation the view originally expressed by Mr. Graham in paragraph 2 of his note, dated the 3rd of December last, is the right view and I should not be understood to depart from it.

No. 46.

(I-II)

Effect of the resignation of Lord Sinha, Governor of Bihar and Orissa, on the position of Ministers appointed by him and of members of his Executive Council.

I

(8th December, 1921.)

(Legislative Department unofficial No. 736 of 1921).

I have read the telegram from the Private Secretary to His Excellency to the Home Department. Lord Sinha, the Governor of Bihar and Orissa, having resigned his office, the question which has arisen is whether his resignation has the effect of causing a vacancy in the office of the Ministers appointed by him. Section 52 (1) of the Government of India Act gives the Governor of a Governor's province power to appoint Ministers, and provides that any Ministers so appointed shall hold office during his pleasure. I understand that no appointment has yet been made in place of Lord Sinha, but that under Section 91 of the Government of India Act the Vice-President of the Executive Council of Bihar is holding and executing the office of Governor.

I do not think that the words " during his pleasure " in Section 52 (1) mean anything more than this that, if the Governor who has appointed a Minister desires him to go out of office he must go out of it. I do not think they necessarily imply or can be held to imply that upon the retirement or death of the Governor who appointed a Minister, the Minister also goes out of office. No doubt, Lord Sinha's successor, whether he is an acting Governor or a permanent Governor, can in the exercise of his pleasure ask a Minister to go out, but until such pleasure is exercised I do not think that the mere retirement of a Governor has the result of causing a vacancy in the office of a Minister.

2. Anson in his Law and Custom of the Constitution, Volume II, discusses the effect of the demise of the Crown and after referring to the various earlier statutes refers to the *Demise of the Crown Act,* which enacts that the holding of any office under the Crown, whether within or without His Majesty's Dominions, shall not be affected, nor shall any fresh appointment thereto be rendered necessary by the demise of the Crown. He then sums up the present position as follows :—" Thus the demise of the Crown no longer affects the duration of Parliament, nor the tenure of office, though legislation has in no way affected the prerogative of the Crown as to the dissolution of Parliament or the dismissal of Ministers." (See also Halsbury's Laws of England, Volume VI, page 384.) I do not think that it is very necessary to rely upon this analogy, but it does to a certain extent support the conclusion at which I have arrived upon an interpretation of Section 52 (1) of the Government of India Act. My answer, therefore, to the question referred to me is that in my opinion the Ministers already appointed by Lord Sinha can continue to hold office until dismissal or resignation, and that the resignation of Lord Sinha has not the legal effect of terminating the offices of the Ministers.

II.

(9th December, 1921.)

The point raised in the case is one of considerable importance, and although the balance of considerations inclines me to accept the view of Mr. Graham, I cannot say that a contrary view is altogether impossible. It appears that by reason of the resignation of Lord Sinha of his office of Governor of Bihar and Orissa, the Vice-President of his Executive Council is holding and executing the office of Governor under Section 91 (1) of the Government of India Act. The question which now arises is whether by reason of the fact that the Vice-President of the Council is acting as Governor, there is a vacancy in the Executive Council, which must be filled in the manner provided by Section 92. Section 90 deals with the case of a temporary vacancy in the office of Governor General. Under that section the Governor of a Presidency, who was first appointed to the office of Governor, is required to hold and execute the office of Governor General *until a successor arrives* or until some person in India is duly appointed thereto. But when such a Governor acts as the Governor General clause (2) of Section 90 requires that his office of Governor shall be supplied for the time during which he acts as the Governor General in the manner directed by this Act with respect to vacancies in the office of Governor. There are no such words to be found in Section 91 (2), and Mr. Graham argues that this omission in Section 91 (2) was intentional. I am inclined to agree with him. If it was intended that when the Vice-President acts as Governor, his office as Member of the Executive Council must be ' supplied ' in the manner required by Section 92, most probably there would have been a provision to that effect in Section 91 (2).

The contrast between Section 90 (2) and 91 (2) is therefore very important, and for this reason I am inclined to agree that it is not necessary to appoint a third Member of the Executive Council in Bihar during the time that the Vice-President acts as Governor. I am fortified in this view upon a consideration of Section 92. If one looks merely to the provisions of Section 92 (1), one may find it difficult to hold that in the events which have happened there is not a vacancy in the office of a Member of the Executive Council in Bihar. The opening words of clause (2), that is to say, " until a successor arrives " *indicate,* to my mind, that the vacancy contemplated by Section 92 is of a different character from that which has happened in Bihar. I am afraid I cannot treat this case as falling under Section 92 (3), as to do so would be to put too much strain upon the language of that clause. I am therefore inclined to think that there is no necessity for the temporary appointment of a third Member of Council.

No. 47.

Treatment of political prisoners.

(5th January, 1922.)

(Legislative Department unofficial No. 724 of 1921).

I cannot exactly understand what the Secretary of State means by saying that in the case of certain political offences a longer term of imprisonment should be prescribed. Chapter VI of the Indian Penal Code deals with offences against the State. An examination of the various sections in this chapter shows that the sentences prescribed are either death or transportation for life and forfeiture of property, or 10 years or seven years, and three years under Section 129 which is really not of the same character as the other sections of the chapter are. Take for instance, Section 124-A. Under this section the accused may be punished with transportation for life and any shorter term to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine. I have known long terms of imprisonment and also short terms of imprisonment being passed by Judges. The length of the sentences depends, in the first place, on the gravity of the offence in any particular case and also, as my experience shows, on the temperament of the trying Judge. It seems to me, therefore, that so far as the Penal Code is concerned, there is little justification for saying that the sentences already provided for by it are not severe. I do not know whether the Secretary of State had in view the Criminal Law Amendment Act and the Seditious Meetings Act—the two Acts, the repeal of which was urged by many members of the Repressive Laws Committee. I doubt very much therefore whether we could persuade the Legislative Assembly to agree to any enhancement to the sentences in our penal law.

2. The question of the treatment of political prisoners is likely to be raised by the Assembly in the next session. It is already the subject of public discussion. I do not think that it is altogether impossible to group political offences in the manner suggested by the Secretary of State, and like Mr. Sarma, I would in this respect support the Secretary of State's suggestion. I also agree with Mr. Sarma that the category of such offences should be strictly limited. What is really at the back of the mind of those who talk of political offences is that persons who are convicted under certain sections (I do not say all) of Chapter VI of the Indian Penal Code or possibly of the offence of criminal conspiracy, when it has any relation to political views, should be dealt with in a manner different from the ordinary or habitual criminal. I do not think that it is impossible to group such offences. When in actual practice we treat or propose to treat a certain class of offenders in a special manner, I do not think that there is any advantage in our refusing to give a statutory recognition to this distinction. I also agree with my Hon'ble Colleague, Mr. Sarma, that the Legislative Councils are not likely to assent to light labour being awarded where the imprisonment is simple on the ground that the law will be made more severe. As regards rigorous imprisonment I agree that the courts should have the power to sentence the offender to imprisonment with either hard or light labour. It is quite obvious to my mind that the sort of labour to which we may put an ordinary hardened criminal is not the sort of labour to which a person belonging to a different station in life or an educated person should be put. It is not that I am opposed

to persons of the latter class being put to hard labour ; but I do certainly feel that we have got to discriminate. If this can be brought about by the division of rigorous imprisonment into two kinds corresponding to the second and the third divisions in England, I should be satisfied.

The desired changes might be effected by rules which might be framed under the law, but I would prefer that we amended our law itself and gave the necessary powers in this behalf to courts of law.

No. 48.

Formation of a Supreme Court of Appeal in India.

(23rd January, 1922.)

(Legislative Department, 'A.' Progs., 1922, Nos. 1-8, A. C.).

I have now considered Dr. Gour's Bill and the opinions recorded in this Department.

On the merits of the Bill, I do not wish to express my opinion at length. I have however read the notes of the various Local Governments and the High Courts, which are on record. It seems to me that the bulk of Indian opinion is in favour of the establishment of such a Court, though I cannot overlook the fact that there are some important dissentients from this view.

I do not think it necessary to discuss the question of policy at great length at this moment as I expect that I shall have another opportunity of expressing myself. I shall, therefore, go into the constitutional question which arises in this case, more particularly with reference to the necessity of sanction.

In order to appreciate the real nature of the Bill, it is necessary to bear in mind the functions which it assigns to the Supreme Court. These functions are summed up in clauses 10, 11 and 13 of the Bill. By clause 10, Dr. Gour gives the Supreme Court the general power of superintendence, revision and control over all Courts, civil or criminal, howsoever established or continued. The Supreme Court is further to exercise the same power of superintendence, revision and control over the several High Courts as the High Courts themselves exercise over the other courts subordinate to them.

By clause 11, the Supreme Court has the power of withdrawing any case for trial before itself, and of transferring any case for trial from any courts subordinate to it for trial by any other court.

By clause 13, the Supreme Court has the power to entertain appeals in criminal cases subject to certain conditions.

2. The powers of the Indian Legislature to make laws are set out in Section 65 of the Government of India Act. By Section 65 (1) (*a*) the Indian Legislature has power to make laws " for all courts ". Obviously enough the expression " all courts " in this clause cannot mean only the courts existing at the time when this Act was passed. The power of the Indian Legislature to create new courts is beyond doubt and has been judicially recognised in several cases, the latest of which are the two Patna cases recorded in Volume III of the Patna Law Journal. They were, however, cases relating to the creation of special Tribunals under the Defence of India Act, but neither the judgments of the Patna High Court nor the words of Section 65 (1) of the Government of India Act can suffice for the disposal of this question. It must be borne in mind that the Court which is intended to be created by this Bill is not a Court subordinate to the jurisdiction of any High Court, but a court to which all the existing courts shall be subordinate. Therein, to my mind, lies the whole difficulty of the question. Leaving aside early history of the creation of the various High Courts in India, it is sufficient for the present to refer to Part IX of the Government of India Act, which deals with the constitution and the powers of the Indian High Courts established in

British India by Letters Patent. Now Section 107 of the Government of India Act prescribes the powers of the High Court with respect to subordinate courts, amongst which powers is the power to direct the transfer of any suit from any subordinate court to any other court of equal or superior jurisdiction. It must also be borne in mind that each of the High Courts has superintendence over all courts for the time being, subject to its appellate jurisdiction.

Now, as pointed out above, by clause 10 of his Bill, Dr. Gour seeks to super-impose upon a High Court a higher court exercising upon the former the power of superintendence, revision and control.

3. By Section 11, as I have pointed out, he gives the power to the Supreme Court to withdraw any case to itself, or to transfer a case from any courts subordinate to it, to any other court. To this extent his Bill obviously affects an Act of Parliament within the meaning of Section 65 (2) (*i*) of the Government of India Act. It is also possible to hold that to the extent to which he allows a right of appeal in criminal cases, there may be a conflict between the powers of the High Court to pass a sentence of death on any of His Majesty's subjects born in Europe or the children of such subjects within the meaning of Section 65 (3) of the Government of India Act and clause 13 (*b*) of his Bill. These reasons would, in my opinion, suffice to support the view that it is not competent to the Indian Legislature, constituted as it is by the Government of India Act, to create a Supreme Court. To put it very moderately, the question, to my mind, is not free from considerable doubt, and having studied the provisions of the Government of India Act and a number of judicial decisions, I am inclined to the view that it would be unsafe to grant any sanction.

4. I am afraid that in disposing of this case, we cannot derive much assistance from the Australian, South African or the Canadian Statutes. The Supreme Court of Australia was created by Section 71 of the Commonwealth of Australia Constitution Act, (63 and 64 Victoria, chapter 12).

The Supreme Court of South Africa was created by Section 95, South African Act, 1909 (9 Edw. VII, chapter 9).

The Supreme Court of Canada was established by the Canadian Act, (38 Victoria, chapter 11), which has since been amended by other Acts of Parliament.

It will thus appear that all these Supreme Courts have been created by Acts of the Imperial Parliament, and for this reason we cannot judge of the validity of the Supreme Court, which is sought to be created by Dr. Gour in the light of the Acts of Parliament constituting these Colonial Supreme Courts. These Acts would, no doubt, be very useful to us if we could get over the preliminary difficulty of the powers of the Indian Legislature and the sanction necessary for this Bill. Whether these Colonial Supreme Courts could be created under the Acts granting constitution to each of the Colonies, is, to my mind, not a very material question. In the first place, their constitution gives them much ampler powers than our constitution does. In the second place, it seems to me that we cannot get over the fact that the Supreme Courts of these Colonies were created by Acts of the Imperial Parliament.

The Colonial Laws Validity Act, (Victoria, chapter 63), provides that every Colonial Legislature shall have, and be deemed at all times to have

had full power within its jurisdiction to establish Courts of Judicature and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provisions for the administration of justice therein. But by Section 1 of the Act, it does not apply to India, and it is therefore useless to rely upon this Act.

In the case of the Bishop of Natal (Moore's Privy Council Appeals, Volume XVI, English Reports) it was laid down by their Lordships of the Privy Council that " it is a settled constitutional principle or rule of law that, although the Crown may by its prerogative establish Courts to proceed according to the Common Law, yet it cannot create any new court to administer any other law ; and it is laid down by Lord Coke in the 4th Institute, that the erection of a new court with new jurisdiction cannot be without an Act of Parliament." It is, however, open to Parliament to delegate this power to the Indian Legislature ; but the fact remains that upon my reading Section 65 of the Government of India Act, such power has not been delegated to the Indian Legislature.

5. If only I could hold out that it was competent to the Indian Legislature to make such a law, I should not find any difficulty in preserving the Royal prerogative of admitting any appeal to the Privy Council irrespective of the provisions of the Code of Civil Procedure in India. But this question does not seem to me to be of any material importance in the view that I am taking of the preliminary point in the case.

For these reasons, I am of opinion that I cannot advise His Excellency to grant sanction to this Bill.

L149LD

No. 49.

Question as to whether Sir Surendranath Banerjee should be allowed to draw the compassionate allowance of Rs. 50 a month granted to him in 1874 in addition to his pay as a Minister of the Government of Bengal.

(4th February, 1922.)

(Legislative Department unofficial No. 37 of 1922).

Sir Surendranath (then Mr.) Banerjee was dismissed from the Indian Civil Service but the Secretary of State gave him a compassionate allowance of Rs. 50 a month. He is at present one of the Ministers of the Bengal Government and the question which has been referred to us is whether, so long as he is receiving the Minister's salary, he is also entitled to draw this Rs. 50 a month ; or, whether the latter should remain in abeyance.

The provision for the salary of a Minister is to be found in Section 52 (1) of the Government of India Act. I am afraid Section 85, as it stands, will not apply to the case of a Minister, as in para. (1) it refers to the Governor General of India and to the other persons mentioned in the second Schedule to this Act. The second Schedule to this Act makes no reference to Ministers, and for this reason I think that Section 85 (2) (*b*) cannot apply to the case of Sir Surendranath Banerjee. Besides, as Mr. Graham points out, a compassionate allowance granted under Section 353 of the Civil Service Regulations is not a pension. Section 85 (2) (*b*) makes no reference to a compassionate allowance at all, and I agree with Mr. Graham that the question must be referred to the Secretary of State who sanctioned the compassionate allowance to Mr. (now Sir Surendranath) Banerjee. At the same time, I feel that the matter is not of very great importance, and I see no reason why it should not be settled without a reference to the Secretary of State. Sir Surendranath is now getting a very substantial salary, and a loss of Rs. 50 a month will perhaps not matter to him at all. I wonder whether it would be regular to make a reference to him, so that he himself might declare his readiness to forego this sum during the tenure of his office as a Minister. If this procedure will be irregular, then I think the reference to the Secretary of State must be made.

No. 50.

Appeals under Letters Patent.

(12th February, 1922.)

(Legislative Department, 'A.', Progs., 1922, Nos. 37-45, A. C.).

I have gone through the judgment of Mr. Justice Tudball. The position in the High Court at Allahabad is this. Letters Patent appeals under Section 10 of the Letters Patent lie against judgments of single judges in civil cases. A single Judge there has got jurisdiction to hear second appeals, the pecuniary value of which does not exceed Rs. 500. Until the point arose in this case, it was the usual custom or practice to pay court fee in Letters Patent appeals. The point which now has been decided by Mr. Justice Tudball did not, so far as I can recollect, arise at all during the time of my practice. Having studied the judgment of Mr. Justice Tudball, I have come to the conclusion that he has taken a correct view of the law, and I cannot agree with the criticism of Mr. Casson. I am afraid Mr. Casson has overlooked the fact that the Allahabad High Court has no original jurisdiction and his criticism so far as it proceeds on that assumption is, to my mind, based on a misconception. Nor can I agree with him when he says that "A court sitting on appeal from a subordinate court is clearly exercising its jurisdiction as regards appeals from that court". The Code of Civil Procedure provides only for two appeals and not for the third. Appeals under Letters Patent are quite independent of the Code of Civil Procedure, and, in fact, some provisions of the Code of Civil Procedure which apply to appeals (ordinarily the first or the second appeal) do not apply to Letters Patent appeals at all, I need not, however, go into this question.

2. There is only one point in the judgment of Mr. Justice Tudball with regard to which I am doubtful. Referring to Section 108 of the Government of India Act, he says that so far as he is aware, Division Courts have not been constituted in the Allahabad High Court. I should have thought that a Bench consisting of two judges in the Allahabad High Court could very appropriately be described as a Division Court. There are specific rules in the Rules of the Allahabad High Court defining the class of cases which can be heard by a Division Bench, and to the extent to which a Division Bench is seized of such cases, it exercises all the jurisdiction vested in the High Court collectively. It is not necessary, however, for the purposes of the point which arises in this case, to decide the matter or to go into it in greater detail. As I have said above, on the interpretation of Section 4 of the Court Fees Act, so far as it has any relation to Letters Patent appeals, I have no hesitation in expressing my concurrence with the view taken by Mr. Justice Tudball. I also agree with Mr. Graham that this is clearly a case for amendment of the Court Fees Act. It is not necessary to go into the earlier history of this section, for in the view that I take and in the view which Mr. Justice Tudball has taken, it seems to me that the word "two" in Section 4 must necessarily exclude an appeal against the judgment of a single Judge under Section 10 of the Letters Patent.

No. 51.

(I-II)

Incorporation in the rules framed under Section 96-B (2) of the Government of India Act of the rules relating to the exclusion of foreigners from Government appointments and public offices in India.

I

(15th March, 1922.)

(Legislative Department unofficial No. 776 of 1921).

Personally, I should have thought that the resolution of the 10th May 1921 was sufficient for all practical purposes. In the second paragraph, it is stated that "the Government of India have therefore decided, with the approval of the Secretary of State, on a general policy of exclusion of all foreigners, subject to exceptions being made in special cases." At first the point raised was whether a rule of exclusion as against foreigners could be made under Section 96-B, and Joint Secretary was of opinion—an opinion with which I agree—that such a rule would be outside the scope of Section 96-B. But though Section 96-B might not justify the framing of such a rule, executive orders to the same effect could be passed by the Secretary of State. The Governor General in Council has issued a resolution on the subject with the approval of the Secretary of State but if that will not suffice and the Secretary of State must himself issue independent orders, I have no objection to the appetite for orders from the India Office being satisfied.

2. Now, the point raised is whether the proposed order, if it is not issued under part VII of the Government of India Act, will be enforceable in respect of transferred subjects. The Governor General in Council can exercise his powers of superintendence, direction and control in relation to transferred subjects in a Governor's province only for the purposes mentioned in rule 49 of the Devolution Rules. One of these purposes is the safeguarding of the administration of central subjects. Now, defence of India is a central subject, and it is urged that if Local Governments can enlist foreign spies for the administration of transferred subjects, the administration of the defence of India by the Central Government will be prejudiced. This is possible, though I very much doubt whether Local Governments will engage foreign "spies" for the administration of transferred subjects. Without going into any question of policy, with which I am not at present concerned, I desire to point out that such an extended interpretation of rule 49—I do not say that it is an impossible interpretation—may in actual practice work as a serious limitation upon the choice of officials by Ministers. A Minister may perfectly in good faith wish to appoint a foreign expert as specialist to some post and yet he will feel that he may be overruled by the Central Government on the ground that in their opinion the appointment of the foreigner is undesirable. In a matter of this character I should much rather trust to the good sense of the Minister than to a prohibitive rule of this kind which is likely to bring us into conflict with the responsible section of the Government of a province. There is the Governor's personal influence and advice also to be reckoned with. For these reasons I regret I am unable to agree to the addition of the words which relate to transferred subjects in the provinces.

II.

(30th March, 1922.)

I have had to-day a discussion about this case with Mr. Graham. He has pressed on me the view that the employment of a foreigner may involve danger to national safety. I have also read and considered the provisions of Sections 6, 7, 9 and 10, Geo. 5, Ch. 92. This statute does not in terms apply to India, but bearing in mind the fact that the Sections just referred to provide that no alien shall be appointed to any office or place in the civil service of the State, I should be prepared to act upon this principle provided it was limited to the employment of men in the permanent civil service. I would not, however, apply to the employment of specialists in certain departments on certain terms for limited periods. It is this class of cases which I had in view when I wrote my note of the 15th of March and it is with regard to such specialists that I should not impose any unnecessary restraints on Ministers. I am, however, prepared to go so far to meet the point now raised as to provide that before appointing a foreigner to any appointment for a fixed period the Minister shall notify his intention to the Governor General in Council who may, if so advised, object to the appointment. Upon such objection being raised the Minister shall not make the appointment but I would not make such appointment subject to the approval of the Government of India as I think our interference with the transferred departments should not exceed the limits already laid down. I know some Ministers already feel that there has been at times unjustified interference with their departments.

No. 52.

Interpretation of the words "existing accruing rights" occurring in the proviso to sub-clause 2 of Section 96-B. of the Government of India Act.

(17th March, 1922.)

Mr. Casson has formulated the question as follows :—

"Whether Section 96-B ensures compensation for civil servants where appointments which they might expect in the ordinary course are abolished".

(Legislative Department unofficial No. 139 of 1922).

The question appears to me to be bristling with difficulty of an extraordinary character by the reason of the fact that the language of Section 96-B is not very easy to construe. Before I make any attempt at the construction of the Statute, there are a few general observations which I should like to make.

It will be noticed that Part VII-A of the Act deals with the Civil Services in India, while Part VIII deals specifically with the Indian Civil Service. Section 96-B (1) first of all embodies the well-known constitutional principle that every person in the service of the Crown holds office during His Majesty's pleasure. It then lays down the principle that the only authority which can dismiss such a servant is that which appointed him. If any person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a Governor's province, he has a right of redress by complaint to the Governor of the province.

2. We next come to the second clause which is the most important clause in connection with the present question. This clause confers upon the Secretary of State in Council power to make rules for :—

(1) regulating the classification of the Civil Services in India ;
(2) the method of their recruitment ;
(3) their conditions of service ;
(4) pay and allowance : and
(5) discipline and conduct.

These rules framed by the Secretary of State in Council may delegate the power of making rules to the Governor General in Council, or to Local Governments, or authorize the Indian Legislature or Local Legislatures to make the laws regulating the public services to such an extent and in respect of such matters as may be prescribed.

3. The second clause of the section is followed by a proviso, which I think must be read as a proviso to this clause and this clause only. As regards this proviso, I agree with Mr. Casson that it must be read as subject to the second clause which embodies the main principle. The effect of this proviso, to my mind, is that every person appointed *before* the commencement of the Government of India Act of 1919 by the Secretary of State in Council to the Civil Services of the Crown in India, is entitled to retain all his existing or accruing rights, and should he lose any of them, he is entitled to receive compensation for the loss from the Secretary of State in Council. The assessment of the compensation must be just and equitable. The implication of this proviso is that those officers who

were appointed after the commencement of the Act cannot be indemnified. The words which cause great difficulty in this proviso are " existing or accruing rights ". First of all, let us take the expression " rights ". The word " right " has a distinct and well-defined juristic meaning ; but when it is used in the plural, as it is used in this section (and more particularly when the context itself shows that it has been used not in a strictly legal sense but in a very extensive sense) we are not compelled to put the strictly juristic meaning on it ; and we should be justified in interpreting it liberally. To this extent I am in agreement with the opinion of Sir George Lowndes in Mr. Todhunter's case ; but that opinion must be read, in my opinion, in the light of the facts of that case, and I should not take it to lay down any very large principle. In that case Mr. Todhunter was a member of the Executive Council of Madras, and as a result of the reforms, he apprehended that the number of civilian members of the Executive Council would be reduced. He suffered or was going to suffer loss, and in any view of this proviso, I think he would have been entitled to receive compensation for the loss of the *existing* right. What then is the meaning of the expression " existing rights " ? I think in construing these words we must refer back to the provisions of clause 2. Clause 2 speaks of conditions of service, pay and allowances. A condition of service may be such that it confers a right upon a member of the Civil Service. Pay and allowances are certainly rights, so that it seems to me that if a member of the Civil Service suffers loss in relation to a condition of service, or to his pay or allowances, as I have explained above, he is entitled to claim compensation under the proviso, but it must be a loss arising by virtue of rules which have been made by the Secretary of State.

4. The word " accruing " presents some difficulty, and I think that it was used in contrast to " existing rights ". An existing right would mean a right which existed at the time when the Act was passed. An accruing right would, I think, mean a right which accrued to a member of the Civil Service after the Act came into force. For instance there might be a special allowance given to officers of certain class, and if by virtue of any rules made by the Secretary of State that allowance was abolished, he would again be entitled to compensation. I do not, however, think that the proviso or the clause itself confers any right of compensation upon a member of the Civil Service for loss sustained by reason of the abolition of an appointment or a class of appointments to which he might have looked forward. For instance, if Commissionerships were abolished, I do not think that a member of the Civil Service could say that because he might have been appointed to a Commissionership and because the abolition deprived him of that chance, he was entitled to that compensation. That would be putting too much strain on the language of the section, and I think it would be an unwarranted construction of it. It must be noticed that the proviso speaks of " every person ". It does not, to my mind, refer to the Civil Service in its corporate capacity. That this is so, appears very clearly when we compare the language of this proviso with the language of Sections 98, 99 and 100 of the Act. There it will be noticed that the Indian Civil Service as a whole is spoken of. Certain appointments are reserved for the Indian Civil Service which are specified in the third schedule, and power is given by Sections 99 and 100 to the authorities in India to fill those appointments under certain conditions

by the appointment of persons who are not members of that Service for certain special reasons. But it will be noticed that these appointments are not made by virtue of rules which are contemplated by Section 96-B, clause (2), but by an order of the authority or authorities in India. There is no provision either in Section 99 or in Section 100 for compensation to any member of the Indian Civil Service for the loss of such an appointment. We have no right to read the proviso to Section 96-B as having any relation to Section 99 or to Section 100. To hold that the abolition of an appointment which ordinarily in practice is held by a member of the Indian Civil Service, confers a right of compensation on him, is practically to hold that he has a right in perpetuity to the continuation of these appointments. I am not prepared to accept this view as warranted by the Act. To take a concrete instance. Suppose a member of the Indian Civil Service is a member of a Provincial Executive Council in a province, in which as a matter of practice before the days of reforms the Lieutenant-Governor used to be a member of the Indian Civil Service. Suppose again that there is a vacancy in the office of the Governor and His Majesty decides to send a Governor out from England, could this Indian Civil Service member of the Executive Council then say " I have been deprived of the chance of being appointed a Governor which in the pre-reform days would in all probability have come to me and I am therefore entitled to compensation ". Such a claim would be in my opinion wholly untenable.

5. The conclusion, therefore, which I have arrived at is that the proviso in question must be read in conjunction with clause 2 of Section 96, and while it gives any individual member of a Civil Service a right of compensation against loss in respect of any condition of service, or pay and allowance, or right of redress, I do not think that it gives a general right of compensation for the loss which may be sustained by virtue of the abolition of any post to which in the pre-reform days members of the Indian Civil Service were as a matter of practice ordinarily appointed.

L149LD

No. 53.

Transfer of the Control of Aden to the Colonial Office.

(26th April, 1922.)

(Legislative Department unofficial No. 276 of 1922).

In this note I do not propose to discuss any question of policy beyond saying that in my opinion Mr. Bray has represented the attitude of Political India *vis-a-vis* Aden correctly. Personally I am myself very strongly opposed to our losing Aden. I also confess that I am not much of a believer in any guarantees given by the Colonial Office in regard to the status and treatment of Indians.

2. I shall now deal with the constitutional aspect of the question. The central idea of Mr. Bray's proposal is " that we should endeavour to regularise the existing position as far as possible, and complete the divorce of India from all but the parochial administration by washing our hands of the military administration. That is to say, we should retain the Aden Settlement as part of British India ; the military and political affairs connected with the Hinterland would be handed over to His Majesty's Government, lock, stock and barrel ". In actual practice it will come to establishing a dual Government in the Settlement of Aden. The civil administration will under this arrangement be under the control of the Governor General in Council and the military administration under that of His Majesty's Government. Under section 33 of the Government of India Act, the superintendence, direction and control of the civil and military government of India is vested in the Governor General in Council, who is required to pay due obedience to all such orders as he may receive from the Secretary of State. If Aden is to be treated as a part of India, then it is obvious that under section 33 not only the civil but also the military government of India must continue to be vested in the Governor General in Council, subject to the ultimate control of the Secretary of State. Consistently with this section, it seems to me to be constitutionally impossible to divide the Government into two independent halves. If, however, there is to be a complete partition between the Settlement of Aden and the Hinterland of Aden, then there can be no possible objection to a separate government, civil and military, being set up in and for the Hinterland.

3. If, on the other hand, it is intended to cut the Settlement of Aden off from India altogether, then it seems to me that any contribution which India may make to His Majesty's Government, however big or small it might be, would be *ultra vires*. Under section 20 of the Government of India Act, the revenues of India can be applied for the purposes of India alone, and it would, in my opinion, be straining the language of section 20 to hold that, because in some contingency the administration of Aden under the control of His Majesty's Government might indirectly affect the security of India, such a contribution would be a contribution for the purposes of the Government of India. If that were so, India might be saddled with liability for the defence of the Suez Canal and any other outlying portions of the Empire which may have some strategical value. In the view, therefore, that I take, it seems to me that constitutionally there is no half-way house.

No. 54.

Rights of Government in regard to Water Power in India.

(*13th May, 1922.*)

(Legislative Department unofficial No. 216 of 1922).

The question referred to this Department is formulated by Mr. Rudman in his note as follows :—

> " The point at issue is whether Government has the power to charge Royalty for water from running rivers (or from reservoirs formed from running rivers) when such water is required for hydro-electric purposes."

Mr. Casson in his note dated the 1st of May 1922 has reviewed at considerable length the history of the various Acts which have been passed, and he has also referred to a large number of authorities, most of which relate to the rights of riparian owners. I do not propose to cover as large a ground as he has in his note. I have studied the cases referred to by Mr. Casson and several others, but I must confess that so far as the abstract question of law relating to the rights of the Crown in the flowing water of a river is concerned, I have not been able to find any precise authority on the point.

2. There is, however, little room for doubt as to the principles applicable to a case of this character. There are certain general principles which have been laid down in English and Indian decisions. It may be stated generally that water flowing in a common channel, is not, excepting in certain cases, the subject of property or capable of being granted to anybody. " Flowing water is *publici juris,* not in the sense that it is *bonum vacans* to which the first occupant can acquire an exclusive use, but in the sense that it is public and common to all who have a right of access thereto." I need not refer at this stage to the exceptions ; they are conveniently summarised at page 358 of Halsbury's Laws of England, Vol. 28. Blackstone in his commentary puts the whole matter, to my mind, very clearly. He says that ' water is a movable wandering thing in which there can only be a temporary transient usufructuary property and which, if it runs away, cannot be re-claimed ; whereas the land covered by the water is permanent, fixed, and immovable, and can be the subject of a certain substantial property of which the law will take notice ". Although, generally speaking, it is true that the flowing water of a public river cannot form the subject of property, yet, as Joint Secretary points out, it is conceivable that there may be cases in which the Crown may own property in such water. The Bombay Land Revenue Code of 1879 is very instructive on this point. I do not say that it is conclusive so far as the proposition of law is concerned ; but it certainly goes to show that in the opinion of the Bombay Legislature " all standing and flowing water, and all lands wherever situated, which are not the property of individuals or of aggregate persons legally capable of holding property, and except in so far as any rights of such persons may be established in or over the same, are the property of Government " (*vide* Section 37.) Strictly speaking, it is not necessary to discuss this point. What is important however is that in the event of hydro-electric works being started by any individual, he should be protected against the civil rights of the lower riparian owner. The lower riparian owner may bring a suit for injunc-

tion against the proprietor of hydro-electric works, and it is also possible that he may have a claim for compensation or damages. So far as protection against suits for injunction is concerned, I agree that it would be desirable to have legislation more or less on the lines of the Indian Electricity Act of 1910. It would also be desirable to legislate for charging a license fee, and I agree with Mr. Graham that if an intending applicant for a license acquires land compulsorily he should be protected against an injunction so long as he keeps within the terms of his license, and is not negligent. I also agree that he should be liable to compensate other riparian owners.

3. As regards the rights of riparian owners *inter se* which may be interfered with, I do not think it is necessary for me to discuss the law at length. Mr. Justice Mookerji has discussed it at great length in his judgment in the case reported in XI, Calcutta Weekly Notes at page 85, and the Privy Council have in a decision (I. L. R. 24 Calcutta, page 865) laid down that " a riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor, who may for legitimate purposes withdraw so much only of the water as will not materially lessen the downward flow on to his neighbour's land ". These rights of riparian proprietors *inter se* will, I think, continue to be unaffected by any legislation which, as suggested by Joint Secretary, may be passed for the protection of the licensee in certain respects.

4. As I have said above, I think the proper thing would be to charge a license fee. A Royalty would seem to be out of question. In its primary meaning, Royalty denotes those rights of the Sovereign which belong to him *jure coronae*, such as right to gold and silver mines ; but the term is also used in mining grants and leases where it signifies that part of the reddendum which is variable and depends upon the quantity of minerals gotten. It is also used in connection with patents and copyrights. I think that to use this expression to recover any payment to be made by the owner of the hydro-electric works who uses the water of a river, would be an improper use of it.

No. 55.

Memorial from Mr. Justice Pearson regarding his seniority in the Calcutta High Court.

(*17th May, 1922.*)

(Legislative Department unofficial No. 348 of 1922).

I do not think that Mr. Justice Pearson has any case on the merits for an alteration of the Letters Patent in his favour. He was appointed an Additional Judge of the Calcutta High Court on the 16th November 1920, and continued as such until he was appointed a permanent Judge of the Court on the 10th February 1922, when a new Judgeship was created. Upon the retirement of Sir Sayed Shams-ul-Huda, Mr. Justice Suhrawardy, a practising Muhammadan barrister, was appointed in his place, and the Letters Patent issued to Mr. Justice Suhrawardy bear date 25th February 1921. Similarly Mr. Justice Cuming was appointed from the Indian Civil Service as permanent Judge of the High Court on the 10th November 1921, and his Letters Patent also bear that date. It is thus clear to my mind that as permanent Judge Mr. Justice Suhrawardy would take precedence over Mr. Justice Cuming and Mr. Justice Pearson ; and I do not think that any other view of section 103 (2) of the Government of India Act is possible. The words " unless otherwise provided in their Patents ", leave no room for doubt that sub-section (2) was intended to apply to permanent Judges. Additional Judges do not get any Letters Patent, and, therefore, this section has nothing to do with Additional Judges. The Governor General in Council can, under section 101, appoint persons to act as Additional Judges for such period, not exceeding two years, as may be required and the Judges so appointed shall, while so acting, have all the powers of a Judge of the High Court appointed by His Majesty under this Act. To my mind, excepting in regard to judicial powers, Additional Judges stand on a different footing from permanent Judges so far as rank and precedence are concerned. I do not think that Mr. Justice Pearson can fairly say that the period during which he acted as Additional Judge should count towards seniority as against Mr. Justice Suhrawardy or Mr. Justice Cuming. The practice of the Calcutta High Court, which clearly appears from the note of Mr. Justice Mukherjee, is wholly against the contention of Mr. Justice Pearson. I may say that that is also the practice of the Allahabad High Court, with which I am more familiar. In 1920 two Additional Judges, namely Mr. Justice Ryves and Mr. Justice Gokul Pershad, were appointed as Additional Judges for two years. Early in 1921 Mr. Justice Knox went on leave preparatory to retirement and was succeeded by Mr. Justice Lindsay, who has since been confirmed, Mr. Justice Knox having now retired so that Mr. Justice Lindsay's appointment as a permanent Judge was subsequent to the appointment of Mr. Justice Ryves and Mr. Justice Gokul Pershad as Additional Judges. In point of fact, however, Mr. Justice Lindsay takes precedence over both the Additional Judges whose term has again been extended for two years. It is also interesting to bear in mind that, like Mr. Justice Cuming in the Calcutta High Court, Mr. Justice Lindsay had, before his permanent appointment, officiated as Judge of the Allahabad High Court on several occasions. I can recollect a few more instances of this character but it is no use multiplying them. The correct view, therefore, seems to be that, in the events which have happened, Mr. Justice Pearson cannot claim

seniority as against either Mr. Justice Suhrawardy or Mr. Justice Cuming, and I think that we ought not to support his contention.

2. As regards the amendment of the Letters Patent, I do not think section 106 (1*a*) has any application to this case. The expression " a High Court " in that sub-section seems to me to refer to the corporate character of the Court, and I do not think that we could rely on that section for the amendment of the Letters Patent issued to each individual Judge. At the same time, it seems to me that there is nothing in the law to prevent His Majesty from altering Letters Patent issued by him. On the merits, however, I do not think that we could suggest an amendment of the Letters Patent in favour of Mr. Justice Pearson.

L149LD

No. 56.

Levy of extra duty on foreign liquors by the Government of Bombay.

(18th May, 1922.)

(Legislative Department unofficial No. 224 of 1922).

Having regard to the notification of the 11th April 1922, which appeared in the Bombay Gazette of April 13th, there can be no room for doubt that the Bombay Government purported to act and did act under sections 12 and 30 of the Bombay Abkari Act, 1878. By that notification they directed that no foreign liquor imported at the ports of Bombay and Karachi or imported into the Bombay Presidency from other ports of British India or from Indian States, etc., etc., was to be removed from the customs-house or distillery or across the boundaries of the presidency to the importer's or transporter's premises in the said presidency except under a pass issued by an Abkari officer. The pass cannot be issued except on the following conditions :—

(1) that the person clearing the liquor from the custom-house or distillery has to pay in addition to any customs or excise duties payable, a fee at the rates specified in that notification, and

(2) that the said fee is payable in the case of persons holding a wholesale importer's licence in quarterly instalments on the quantity of liquor cleared during the quarter, and in other cases before issue of the pass.

In their letter of the 7th April, 1922, the Bombay Government have explained the reason. It appears that the Bombay Government have in the past calculated the rates of vend fees on the basis of the entries in the account books of the licensees. These books have been found to be unreliable with the result that there has been loss of revenue and for this new method of levy. The objection raised by Messrs. Cutler, Palmer and Company and some other firms is that this virtually amounts to imposing a further duty.

2. Under section 12 of the Bombay Abkari Act of 1878 no excisable article can be imported except under a pass issued under section 13, but this is subject to the important proviso that in the case of duty-paid foreign liquor passes are dispensed with unless the Government by notification in the Bombay Government Gazette otherwise directs with respect to any local area. No doubt the Bombay Government have acted under this proviso. Under section 30 of the same Act, every license, permit or pass granted under this Act ' shall be granted on payment of such fee, if any ', etc., etc. The fee, therefore, that they are levying is no doubt covered by section 30. But it must be borne in mind that under section 30 it is not obligatory on the Government to charge any fees. The words ' if any ' in section 30 clearly indicate to my mind that if the Government desired to dispense with any fee they could do so. In the present case, however, they have imposed fees for passes. It seems to me, however, that there is very little room for doubt that in imposing this fee what the Bombay Government wanted to do was not merely to regulate the import or sale of foreign liquor, but to make a substantial revenue. I gather from the papers that they will be making something like Rs. 6 to 7 lakhs as revenue. I could quite understand their charging a fee for

the upkeep of the establishment which the new system might necessitate, but when in substance and in fact the proceeds will amount to substantial revenue, I think it is difficult to avoid the conclusion that they have tried to get round the provisions of section 19 by falling back on sections 12 and 13. Now, section 19 clearly protects from duty all articles which are imported into British India and which are liable on such importation to duty under the Tariff Act.

3. I think two courses of action are possible. The first course is that which is suggested by Mr. Graham in his note. We may point out to them that their notification of 11th April imposes a fee for an import pass under section 12 of the Act not only on firms which import for sale, but also on private individuals, clubs and messes which do not import for sale, and suggest to them the possibility of the Government of India taking action under section 67 of the Government of India Act and introducing with the previous sanction of the Governor General a measure to amend the Abkari Act so as to render the collection of revenue under the guise of fees illegal. I do not think that we can reasonably interfere with the action of the Bombay Government under rule 49 of the Devolution Rules ; and speaking for myself I am averse from modifying or amending that rule. The second course is that any one of these firms may test the validity of this levy in a court of law. I personally think that a suit framed for the recovery of money illegally recovered under the Abkari Act will have a very fair chance of success. A firm might pay money under protest and then file an action for the recovery of that money, raising the issue as to whether the levy of such a fee was *intra vires* of the Bombay Government. When such an issue is raised a court of law would be bound to decide it, and I should think that in considering the issue it will look to the substance and not to the form of the matter. Should it come to the conclusion that in truth and substance the so-called pass fee or import fee is or amounts to revenue, then I do not see any reason why it should not declare it to be so and hold the action of the Bombay Government to be *ultra vires*. I do not think section 67 of the Abkari Act will bar a suit of this character. Questions of this character frequently arise in America and a very instructive case on import duty levied by a state law which was ultimately declared to be invalid is the case of Brown *versus* State of Maryland, in which the judgment of Chief Justice Marshall is very suggestive. Anyhow it seems to me that, quite independently of any decision outside India, any firm which is prejudiced by this notification of the Government of Bombay and has actually to pay this duty may well test the validity of it in a court of law.

No. 57.

Memorial of the Leibaok Syndicate, Ltd., regarding their Wolfram concessions in Tavoy.

(18th May 1922.)

* * * * * * *

I now come to the question of compensation. The Syndicate have claimed six lakhs of rupees as damages. The details of this claim are given in the Schedule attached to the plaint. I think the claim is a very exaggerated one, and so far as it relates to their estimated profits for 1916 to 1918 I think we ought not to entertain that. In assessing compensation I think we ought to remember that in December, 1915 Messrs. Turnbulls themselves offered the Syndicate one lakh clear for their interest and agreed to take over their liabilities at least to the extent of Rs. 25,000 (that is to say Rs. 10,000 to Messrs. Thompson & Co., and other liabilities not exceeding Rs. 15,000). On the other hand, the Syndicate themselves in their letter demanded two lakhs cash down. Mr. Casson suggests Rs. 1,30,000. I do not think that this would be an unreasonable sum to offer to the Syndicate in settlement of all their claims.

(Legislative Department, unofficial No. 698 of 1922.)

2. Lastly, I may add that in arriving at the conclusions recorded above, I have not taken a very strict and narrow legal view. It may be that the claim of the Syndicate against the Secretary of State as put forward in their plaint will fail. Personally I think that the plaint of the Syndicate is a bad specimen of pleading. It may also be that the Syndicate might have pursued their remedy against Messrs. Turnbulls, but neither of these two considerations should, in my opinion, stand in the way of Government doing justice to them when it is clear that by the arbitrary action of the Burma Government, they were thrown out of possession and deprived of the lease they had applied for. That they had some claim which could be assessed, in money, appears from the offer of one lakh of rupees made to them by Messrs. Turnbulls in December, 1925. I am aware of the principle that no Government would be justified in being generous at the expense of the tax-payer. At the same time I feel that a big Government ought not to follow the example of an ordinary litigant who may justifiably take advantage of any legal or technical flaws in the claim of his opponent. The decision of the House of Lords in the case of Dekeyser's Royal Hotel (Appeal Cases 1920, page 508) does not, I think, in terms apply to the present case, but is very useful and instructive as laying down broad and general principles of justice and fairness which ought to regulate the Government in its dealings with subjects even under the stress of war emergency. In the case just cited, Lord Atkinson observes as follows :—

> " It appears to me to be almost inconceivable that the Crown should claim the right to do such things as prostrate fences, take possession of the great industrial works mentioned, or cause any building to be destroyed without being bound at law to compensate the owners therefor ".

While I do not rely upon this English case as a case on all fours with the present one, I think the spirit of the observation of Lord Atkinson and of the various Law Lords should guide us in dealing with a case of this character.

No. 58.

The Sikh Gurdwaras and Shrines Tribunal Bill.

(10th June, 1922.)

(Legislative Department, Genl. A., June 1922 Nos. 11-12).

The sum and substance of this Bill is that a special Tribunal consisting of three Sikhs, one to be nominated by the Shiromani Gurdwara Parbhandhak Committee, and one by the local Government, is to be constituted (*vide* section 4). This tribunal is meant "for the trial of all civil suits arising in connection with the Gurdwara or shrines mentioned in the Schedule". The members of the Tribunal are to receive such remuneration as the local Government may fix. It would seem that the underlying idea is to give this Tribunal the status and character of an ordinary civil court.

Clause 11 of the Bill makes all the provisions of the Code of Civil Procedure, 1908, applicable for the trial of civil suits so far as they are consistent with the provisions of this Act. Indeed, that clause goes on to say that "all the powers of a District Judge as defined in the said Code shall vest in the Tribunal". Power is reserved to the local Government to make rules for the carrying out of any provisions of this Act, and in all matters connected with the conduct of suits, the rules framed by the High Court for the conduct of suits in the court of a District Judge shall be deemed to be applicable.

I have briefly set out above the general substance of this Bill without going into the minute details of the various clauses. I propose to deal with the clauses later on ; but before I do so, I desire to make a few general observations with regard to this Bill.

2. *General observations.*—It is a remarkable piece of legislation and, so far as I know, without any parallel or precedent in the history of Indian legislation. I do not know whether the Punjab Government have decided upon legislation of this character as a result of compromise with the leaders of the Akalis or in the hope of conciliating them. But even if there is no foundation for any such supposition, I still think that it will be necessary for us to consider the question of policy. No doubt, the subject of religious and charitable endowments is a provincial subject. But it does affect the administration of civil law and justice, and to this extent I think it is our duty to consider whether we should be parties to the creation of a court, such as is intended to be established by this Bill. Speaking for myself, I think it is a very dangerous precedent to establish. Communal representation in political bodies may be a necessity of the conditions of India, but it requires very serious consideration whether the Government should concede to the demand for communal judges. Apart from that, it will be observed that the Bill gives the right to nominate two judges to the Sikh members of the Punjab Legislative Council and the Gurdwara Parbandhak Committee respectively. It seems to me to be a very serious departure from the ordinary constitutional practice, in accordance with which the appointment of Judges must rest either with the Crown or with the Executive Government. It is by no means inconceivable that disputes of this character

may become very acute among the Mahomedans in relation to some of their waqfs or among the Hindus in respect of some of their temples. Are we prepared to concede to the Mahomedans and to the Hindus what we are now conceding to the Sikhs? Neither as a lawyer nor as a politician can I easily reconcile myself to a court of this character. I should be very sorry indeed if my attitude were considered to be one of obstruction, which it is certainly not. I have expressed these views only because I feel very strongly on the question of principle involved in this Bill : and no one would be more happy than if we could assist the Punjab Government in any way in settling the unfortunate differences that have arisen in the Punjab.

The various sections of the Code of Civil Procedure or of the Criminal Law, which are sought to be amended by this Bill, are referred to at length in the note of Mr. Graham, and I do not wish to cover the same ground over again beyond expressing my concurrence with them. I think previous sanction of the Governor General will be necessary so far as those clauses are concerned under section 80-A (3) of the Government of India Act.

3. There is another general question which I may notice here before going into the specific clauses of the Bill. Nowhere in the Bill has any provision been made directly for an appeal to the High Court. I suppose it is assumed that inasmuch as all the provisions of the Code of Civil Procedure are applicable to suits instituted in or transferred to the court of the Tribunal, appeals will lie automatically to the High Court. I very much doubt whether a general provision of this character can give an appeal to the High Court Appeal is a creature of the Statute and must be expressly provided for. I need not cite authorities on this point ; I only refer to the decision of the Privy Council given a few years back, in which they held that no appeal lay to them from a decision of a High Court in a case arising under the Land Acquisition Act, as there was no special provision for that in the Act of 1894.

But quite apart from this, it seems to me that it is impossible for the Punjab Legislative Council to confer any jurisdiction upon the High Court. This point is covered by a Judicial authority. In the case of Hari *vs.* the Secretary of State for India (Indian Law Report XXVII, Bombay, page 424) which arose under the City of Bombay Improvement Act of 1911. One of the points raised was as to whether that Act could confer on the High Court jurisdiction to entertain appeals from such a Tribunal. Dealing with that point, Sir Lawrence Jenkins observed as follows :—" The Improvement Act cannot confer on us this jurisdiction, because the local legislature has no power to control or affect by their Act the jurisdiction or procedure of the High Court, as that power rests with the Imperial Parliament and with the Legislative Council of the Governor General ; " (*see* 24 and 25 Vict., ch. 104).

4. Section 48 of the City of Bombay Improvement Act, 1898, may in this connection be referred to. It will be observed that the Tribunal constituted there consisted of three members, that is to say, a President and two Assessors. One of these Assessors was to be appointed by the Government ; the other Assessor was to be nominated by the Corporation and sub-clause (11) provided that in any case in which the President may grant a certificate that the case is a fit one for appeal, there shall

be an appeal to the High Court from the award or any part of the award of the Tribunal. Sir Lawrence Jenkins held that the Tribunal created by the Act was not a court and was therefore free from the control and supervision of the High Court, except where an appeal was sanctioned by its President ; but that Act being an Act of local legislature, jurisdiction could not be conferred on the High Court. As a result of the decision of the Bombay High Court, a Validating Act had to be passed by the Indian Legislative Council. Section 1 of that Act ran as follows :—" The City of Bombay Improvement Act of 1898 shall, so far as it requires the appellate jurisdiction conferred upon the High Court by section 48, sub-section (11) thereof, be as valid as if it had been passed by the Governor General in Council at a meeting for the purpose of making laws and regulations." I am aware that section 38 of the Punjab Courts Act of 1918 provides that an appeal from a decreed order of a District and Sessions Judge or an Additional Sessions Judge exercising original jurisdiction, shall lie to the High Court. But if the view that a local Legislature cannot confer jurisdiction on the High Court is correct, then it follows that so far as this section of the Punjab Act is concerned, it is *ultra vires*. It will be noticed that when the Lahore High Court was constituted and cases had to be transferred from the old Chief Court which was superseded by it, special legislation had to be passed by the Indian Legislative Council transferring those cases to the newly constituted High Court, *vide* Act IX of 1919.

5. I am also aware that in some other provincial Councils, Acts have been passed on the jurisdiction upon High Courts As an illustration, I may mention the Agra Tenancy Act, but I am afraid that in the view taken above, those provisions of the Provincial Acts must be held to be *ultra vires*.

Shortly put therefore, the position is that so far as appeals to the High Court from this special Tribunal are concerned, they must be provided for by an Act of the Indian Legislature and not by an Act of the Provincial Legislature. In arriving at this conclusion, I have not overlooked the provision of section 16 of the Letters Patent of the Lahore High Court. I would only add that in the first place the words " declared, subject to appeal " in that section to my mind seem to require express conferment of the power to entertain appeals ; and the words " competent legislative authority *for India* ", seem to indicate, to my mind, either Parliament or the Indian Legislature. I do not think that it would be a fair interpretation of these words to hold that the Punjab Legislature is a competent legislative authority *for India*.

No. 59.

Conveyance of Indian State Prisoners over Indian Railways. (Case of Muhammad Yaqub.)

(12th June, 1922.)

(Legislative Department unofficial No. 460 of 1922).

One Muhammad Yaqub appears to have been arrested by the Nabha authorities in Patiala territory and taken to Nabha. He was then being taken by the Nabha Police to Nabha and passed over a railway on which the British Railway Police exercised jurisdiction. The Patiala Darbar informed the Agent to the Governor General that the man had been kidnapped from the Patiala territory and asked that he should be taken into the custody of the Railway Police. The Agent to the Governor General thereupon asked the Assistant Inspector General, Railway Police, to take charge of Muhammad Yaqub if found within the railway jurisdiction.

The question referred to us is whether the action of the Agent to the Governor General was legal.

I do not think that the case of Muhammad Yasuf decided by the Privy Council has very much to do with the circumstances of this case.

2. The question which really arises, to my mind, in the case, is as to whether the Nabha Police had any authority in law to keep this man in their custody within the British Railway Police jurisdiction. I am of opinion that they had no such power and that the Assistant Inspector General of the Railway Police was quite within his rights in releasing this man from that unlawful custody. It is true that prisoners in the custody of the Police of Indian States are very frequently taken by the Police officers belonging to the States in railway trains. Strictly speaking, from the legal point of view, the State Police have no power to hold such prisoner in their custody while passing in railway trains through land which is either British territory or in respect of which jurisdiction has been ceded to the Government of India. It may be assumed, as Mr. Graham points out, that there is some agreement (I.A., May 1912, Nos. 104—106) expressed or implied which justifies such a practice. In the present case, however, assuming that there was such agreement, all that the Nabha State can say is that that agreement has been broken. Personally I think that, having regard to the circumstances of this case, the breach of such agreement (assuming that there is an agreement of that character) could and should be justifiable. *Prima facie*, the arrest of Muhammad Yaqub, a Patiala subject within the Patiala territory, by the Police of Nabha was illegal. At any rate, it is open to very serious doubt, and in arriving at the conclusion which I have recorded above, I confess that I have been to some extent influenced by the consideration that the arrest was *ab initio* illegal, and the continued detention of Muhammad Yaqub by the Nabha Police over a territory in respect of which jurisdiction had been ceded in favour of the Government of India was, in my opinion, illegal.

I have looked into the Travancore Darbar case and read the opinion of the Advocate General of Madras (I. A., May 1912, Nos. 104—106). There are some passages in that opinion which support the view taken in this Department. But that case may be distinguished from the present case

inasmuch as a notification in the Foreign and Political Department, dated the 24th April 1912, was issued legalizing the practice over the portion of the Tinnevelly-Quilon Railway which runs through the Travancore State.

3. In short, my opinion is the same as that of the Joint Secretary, and I think that the release of Muhammad Yaqub by the Assistant Inspector General of the Railway Police from the custody of the Nabha Police cannot be challenged by the Nabha Darbar.

No. 60.

Establishment of a Chartered High Court for Burma.

(16th June, 1922.)

I am in agreement with Mr. Graham when he says that there are good reasons for not abandoning the model of the old Letters Patent which has been followed so far. Having read the draft Letters Patent of the proposed Burma High Court, I do not think that there is anything in its constitution, powers or functions which warrants any serious departure from the time-honoured models. The public mind in this country has been accustomed to a certain model constitution of High Courts, and excepting where urgent considerations of convenience and experience gained in the working of the constitution of the other High Courts would justify a serious departure in essentials from that model, I should be unwilling to depart from it. In certain matters, the Patna and the Lahore High Courts have departed from the old model, but I do not think that their differences are by any means essential. I do not wish to labour this point further, and I shall at once proceed to examine the various clauses of the draft Letters Patent.

(Legislative Department unofficial No. 792 of 1922).

2. *Preamble.*—In the events which have happened, I think it is not strictly accurate to speak of the United Kingdom of Great Britain and Ireland. It would perhaps be more accurate to say that the United Kingdom now consists of Great Britain and Northern Ireland. What may happen in the future, no one can say for certain.

3. *Clause 1.*—To an outsider like myself, who has no personal knowledge of Burma or its judicial administration, it is somewhat confusing to speak of the Judicial Commissioner and of the Court of the Judicial Commissioner of Upper Burma in the same paragraph. But this seems to be unavoidable, in view of the fact that criminal jurisdiction is exercised by the Judicial Commissioner and civil jurisdiction is exercised by the court of the Judicial Commissioner.

4. *Clause 3.*—If the Burma Bill is passed by Parliament (and it is almost certain that within a few days it will be, if it has not already been, passed) I think Burma will have a Governor. Unless, therefore, the High Court is to be established before the Lieutenant-Governor is replaced by a Governor, I think we may as well anticipate the future and use the word " Governor " in this clause and subsequent clauses in place of the word " Lieutenant-Governor."

5. *Clauses 7 and 8.*—These clauses deal with the admission of Advocates and Pleaders. Clause 9 of the Letters Patent of the Calcutta, Bombay and Madras High Courts authorises and empowers those Courts to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court shall seem meet. The same language is used in the Letters Patent of the Allahabad, Patna and Lahore High Courts. In the Burma draft, the words used are Advocates and Pleaders. I prefer to follow the old model. The words Vakil and Pleader are not always synonymous though for certain purposes they may be. No doubt, in section 101 (3) (*d*) the expression used is " a pleader " which has been held to be sufficiently large to include a Vakil. But the professional status of a pleader in some parts of India is not the same as that of a Vakil.

Besides, it seems to me that as the Burma High Court is going to have original jurisdiction, it is necessary to make a reference to Attorneys in clauses 7 and 8.

6. *Clause 10.*—This clause is practically the same as clause 12 of the Calcutta Letters Patent, with this difference only, that the Burma draft gives no original jurisdiction to the High Court in cases falling within the jurisdiction of the Small Cause Court at Rangoon, while the Calcutta Letters Patent say that the (Calcutta) High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta in which the debt, damage, or value of the property sued for does not exceed Rs. 100 (one hundred rupees only). I think a departure in this respect in the draft Letters Patent is desirable.

7. *Clause 13.*—This is a very important clause and corresponds with clause 15 of the Calcutta, Bombay and Madras Letters Patent and clause 10 of the Allahabad, Patna and Lahore Letters Patent. I would first of all draw attention to the fact that in the Letters Patent just referred to only the word " judgment " is used and though it has given rise to a considerable amount of judicial discussion in Calcutta, Bombay and Madras, in actual practice not much difficulty is felt in interpreting the word " judgment " as used in the Letters Patent. I may refer to some of the leading cases here. They are : The Justices of the Peace, Calcutta, *versus* the Oriental Gas Company (VIII.—Bengal Law Report p. 433) ; 43 Calcutta, p. 857 ; and 45 Calcutta, page III, IX Bombay Law Reports, page 398 ; and 35 Madras, page 1. In the re-draft of clause 13 prepared by Mr. Graham, I note that the word " Judgment " is followed by the words " decree or order ". Probably, Mr. Graham has used those words in view of the conflict which has arisen about the meaning of the word " judgment ", and certainly the use of these words brings the clause into line with the provisions of the Code of Civil Procedure. At the same time, it must be borne in mind that under the Code of Civil Procedure appeals lie either from decrees or orders. They never lie from judgments. It is a little difficult to foresee all the consequences of the introduction of those words, *i.e*, decree or order, in this clause. Whether the addition of these words will have the result of restricting or enlarging the meaning of the word " judgment " is a question which requires careful consideration. It seems to me that it would be possible to argue that even though a judgment may not amount to a decree or order, still it would be appealable. This may perhaps give a more extended right of appeal than we intend.

8. I note that in the draft prepared by Mr. Graham, there is an express provision for an appeal from the judgment, decree or order made in the exercise of the appellate jurisdiction by a single Judge. So far as the principle of an appeal against the judgment of a single Judge, sitting on the Appellate Side, is concerned, I am in entire agreement with it, and I think it would be unfortunate to omit that from the Letters Patent. At the same time, there are one or two observations, which I should like to make in this connection. I think it would be dangerous to keep the word " decree or order " in this section. I have been accustomed to this practice in the Allahabad High Court. Appeals lie against the judgment of a single judge, but I do not think that the word " judgment " has ever been interpreted in that Court, or, for the matter of that, in other Courts, to include orders, such as orders of remand under O.-41 rule 23, or orders

remitting issues under O.-41 rule 25. Personally speaking, I am inclined to omit the words " decree or order ". Again, it must be remembered that when appeals under the Letters Patent are filed, the practice of the High Court is that the appellant files only grounds of appeal, and neither the judgment or the decree is filed along with the grounds of appeal. The inclusion of these two words, " decree or order " may possibly necessitate the filing of the decree or a formal order. This is of course a question of practice ; but reasons of convenience suggest that it is not necessary to file copies of decree or orders of a single Judge, although the Code of Civil Procedure may require that in appeals to the High Court from the subordinate Courts copies of decrees and orders must be filed. Again, while I appreciate the principle or the reason for Mr. Graham laying down that such appeals shall lie only in cases in which the sum or matter at issue is of the amount or value of more than Rs. 3,000, I think it is necessary to point out that this is a serious departure from the Letters Patent of the other High Courts. In actual practice, it will amount to giving a single Judge jurisdiction to try cases of the value of Rs. 3,000. In this respect the practice of the various High Courts slightly differs. In Allahabad, a single Judge can hear appeals, the value of which does not exceed Rs. 500. In Calcutta, I believe the limit is Rs. 1,000. I am not sure about Bombay and Madras, but my recollection is that even there the limit is by no means more than Rs. 1,000. The pecuniary limit of the jurisdiction of a single Judge is laid down in the rules of the various High Courts. My own opinion is that ordinarily cases in High Courts should be disposed of by a Bench of two Judges. A single Judge's decision in the exercise of appellate jurisdiction does not command the same weight as the decision by two Judges. I would not therefore depart from the well-established practice of the other High Courts with regard to the pecuniary limit of the jurisdiction of a single Judge, and I would leave that limit to be prescribed by the rules of the Court. While I prefer to follow the Punjab and the Patna Letters Patent in excluding appeals from judgments passed in the exercise of revisional jurisdiction, so as to avoid the conflict which has arisen in certain courts, I would in view of what has been urged above delete the word " appellate " from clause 13, line 7.

9. *Clause 14.*—I prefer the re-draft of this clause by Mr. Graham to the original draft. I note that so far as those civil Courts are concerned which are not now subject to the superintendence of a Chief Court or a Court of Judicial Commissioner, Mr. Graham provides in his draft for local legislature, conferring jurisdiction upon the High Court to entertain appeals from them. An express clause to this effect should, in my opinion, remove the doubt about the meaning of the expression " competent legislative authority for India." Only the other day, in dealing with the Punjab Gurdwara Bill, which came up to us from the Punjab, I expressed the opinion that the Punjab Legislature could not confer any jurisdiction upon the High Court, and quoted in support of that opinion the judgment of Sir Lawrence Jenkins (Indian Law Reports 27, Bombay, 424). This express provision in clause 14 is, to my mind, a suitable departure from clause 11 of the Lahore and the Patna High Courts Letters Patent. The peculiar position of Burma and the possibilities of the future make it all the more necessary to confer this power on the local Legislature.

10. *Clause 16.*—Mr. Graham suggests that clause 16 may be retained with the substitution of the words " within the province of Burma " for the words " within the local limits of the ordinary civil jurisdiction of the

said High Court ". This may be compared with clause 18 of the Calcutta High Court Letters Patent. It will be noticed that clause 16 first of all directs that the cases for the relief of insolvent debtors at Rangoon are to be held before one of the Judges of the High Court, and then it confers jurisdiction on the said High Court with respect to original appellate jurisdiction. I am afraid the mixing up of original and appellate jurisdictions of the High Court in bankruptcy cases is not very desirable and may lead to confusion. I also doubt whether the effect of the substitution of the words suggested by Mr. Graham will not be to extend the original jurisdiction in bankruptcy to a much larger extent than is probably intended. I should particularly like this clause to be carefully considered, as I confess that the language of similar clauses in the old Letters Patent too is not very clear.

11. *Clause 17 and 17-A.*—These may be compared with clauses 19 and 20 of the Calcutta Letters Patent. It will be noticed that in the Calcutta Letters Patent in both clauses " law and equity " are spoken of together, and in clause 20 the expression " rule of good conscience " is also introduced. Section 12 (1) of the Burma Laws Act, 1898, embodies the principle which is contained in the Civil Courts Acts of several other provinces. But sub-section (2) provides that, subject to the provisions of sub-section (1) and of any other enactment for the time being in force all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary civil jurisdiction ; and sub-section (3) provides that in cases not provided for by sub-section (1) or sub-section (2) or by any other enactment for the time being in force the decision shall be according to justice, equity and good conscience—a rule which is also embodied in various Acts relating to Courts in other provinces. I do not see any objection to clause 17 of the draft Letters Patent standing as it is ; but I cannot, on principle, understand clause 17-A. I can understand the Burma Court being required to follow in certain circumstances the rule of equity, justice and good conscience. So far as the rules of equity are concerned, I do not think that there is anything peculiar about the equity which the Calcutta High Court dispenses. The fountain-head of all equity jurisdiction as exercised in India is the law built up by the Chancery Court in England, though there is no doubt that, as in England so in India, the application of the rules of equity as evolved in England either by usage or by enactment or by judicial decisions, may present some difficulty. Differences in the application of equitable principles are by no means less common or less rare than they are in the application of rules of common law, and this is as true of England as of India. I am aware that High Courts in Presidency Towns claim to have inherited their jurisdiction from the old Supreme Courts, and that it is very often urged that the common law of England applies to Presidency Towns, excepting where it has been modified by Statute Law. Since the Supreme Court disappeared, a great deal of common law has been codified in this country, and our Codes apply as much to the Presidency Towns as to the Moffussil. Similarly, in regard to equity, nothing is more obvious, than that both in England and in India during the last sixty years, there has been a great deal of legislation embodying or defining rules of equity. The Specific Relief Act, Trust Act, and the chapter on mortgages in the Transfer of Property Act in India are prominent instances. It is true that High Courts which

have merely appellate jurisdiction have not been given power to issue Writs of Mandamus. I however wrote a note on this question some time ago, and I was reading the other day the replies of the various local Governments to the letter which was issued on this subject from the Home Department. I notice that a Bill will soon be introduced so as to extend the jurisdiction of the High Courts of Allahabad, Patna and Lahore. I desire, however, to point out that even in the Moffussil and the High Courts of Allahabad, Patna and Lahore where the Statutory Law is found to be deficient or defective in any respect it is very common to rely upon the rules of common law or equity as the case may be. Take for instance, the whole Law of Torts. We have not codified it in India, and yet the English Law of Torts is followed in the Presidency Towns and the other provinces alike. As regards equity itself, in cases of undue influence, fraud, trusts, mortgages, accounts, administration, receivers, and injunctions, the same principles of equity as are applied, in Calcutta, Bombay and Madras are applied everywhere else. No doubt in the earlier days of the establishment of High Courts in the Presidency Towns it used to be argued that those Courts had some peculiar jurisdiction which other High Courts had not. But a perusal of those earlier cases will show that even with regard to the extent of the application of common law, there was not always unanimity among Judges of the same Court or among various High Courts. In this connection, I would draw attention to an interesting discussion of the subject by Dr. Whitley Stokes in the first volume of the Collection of English Statutes applicable to India. That note was written so far back as 1874, and since then principles of equity in England and in India have been considerably developed and crystalised. Excepting therefore, in certain matters of practice and procedure where it is possible that usage of the High Courts in the Presidency Towns may be different, I do not think that, so far as the principles of equity are concerned, there is any substantial difference between their application by those Courts and the other High Courts. I think that the notion that the equity which is administered by the High Courts in the Presidency Towns has some peculiar flavour about it, is one of those superstitions which grow by repetition, but which cannot stand the scrutiny of a careful examination. For this reason, I am of opinion that we should not hamper the Rangoon High Court in its discretion in regard to the application of equitable principles by necessarily following the model of the Calcutta Equity which, to my mind, has nothing peculiar about it.

12. One result of retaining clause 17-A as it is, may be that the Burma courts will always be compelled to prefer the Calcutta rulings on its equity side to those of other Courts, Indian or English. This may operate as a serious limitation upon the discretion of the Burma Judges. I am inclined to think that we need not prescribe such an arbitrary standard for the Burma Judges, and we may trust to their judgment and capacity to apply the broad principle of equity. Again, the expression, " rule of good conscience," as used in section 13 of the Burma Laws Act and certain other Acts applicable in other Provinces, is a very elastic phrase, but perhaps its value is increased by its elasticity. Mr. Justice Mahmood of the Allahabad High Court has made comments on this in several decisions of his, and I think he has emphasised in more than one of his judgments the idea that the rule of good conscience is a varying rule which must be applied not merely in the light of the circumstances of each case but with due regard to the social and moral development of each community. For

these reasons, I would suggest that this limitation on the powers of the Judges of the Burma High Court, which requires them to follow as nearly as may be the rule of equity, which would be applied by the High Court of Judicature at Calcutta, should be done away with.

13. *Clauses 20, 21, 22, 23 and 24.*—Call for no special comments, excepting the one which I shall presently make. They are practically the same as similar clauses in the Calcutta and the Punjab Letters Patent. The comment that I desire to make is with reference to the use of the phrase " the Advocate General " in clauses 22 and 24. Under section 114 of the Government of India Act, His Majesty may appoint an Advocate General for each of the Presidencies of Madras, Bombay and Bengal. Speaking for myself, I see no reason why these three Presidencies should be the only fortunate Presidencies where the Chief Crown Law Officer should have the position, status and powers of an Advocate General, while in other places he should be merely a Government Advocate. The fact that in the Presidency Towns the High Courts have inherited Advocates General from the days of the Supreme Court may be a good explanation for the existing law, but it is not, to my mind, a sufficient justification for differentiation between the Presidencies and the other Provinces. Considering that the Rangoon High Court is going to have original jurisdiction and that the Calcutta model, at least in respect to its equity jurisdiction, is held up to it, I see no reason why there should not be an Advocate General there. I recognise the difficulty under section 114 of the Government of India Act, but I would earnestly urge that the law should be amended so as to place the Crown Law Officers attached to the various High Courts on a footing of equality. I am not urging for an increase in the salary of Government Advocates. Indeed, the Advocates General in Calcutta, Bombay and Madras do not get the same salary. What I am suggesting is that the status and position of Government Advocates generally should be raised to that of Advocates General. I do not wish to go into this question in greater detail, as the issue in the present case arises only incidentally.

14. *Clause 29.*—This clause deals with Admiralty jurisdiction. In my opinion the words " all such " in this clause do not necessarily mean ' precisely the same." I read them as indicating the extent of the Maritime jurisdiction which is enjoyed by the Calcutta High Court: I agree with the suggestion of Mr. Graham that we might have the words " as might immediately before the date of publication of these presents be exercised " for the words " as may now be exercised ". This will, to my mind, be a distinct improvement. I believe the same amendment may have to be made in clause 30.

15 *Clause 31.*—This deals with the Testamentary Intestate jurisdiction. This is practically the same as clause 24 of the Punjab Letters Patent. I have read the notes of Mr. Casson on this clause. I prefer to have clause 31 mainly because it gives a self-contained constitution to the High Court. When any attempt is made to extend the limits of the ordinary original civil jurisdiction, then I think will be the time for us to consider the means by which it may be effected.

16. *Clauses 40 and 41.*—Deal with special Commissions and Circuits and the proceedings relating thereto, and are practically the same as clause 31 of the Calcutta and clauses 33 and 34 of the Punjab Letters Patent.

I think clause 40 does not exclude the idea of a Division Bench sitting outside Rangoon. The expression "more judges" is, to my mind, sufficiently large to include the idea of a Division Bench. Clause 40 may be compared with clause 35 of the Patna Letters Patent which provides more explicitly for one or more Judges of the High Court visiting the Division of Orissa. If anything similar to section 35 is wanted for Burma, I have no objection ; only the necessary changes will have to be made in the clause.

17. *Clause 42.*—Follows the Punjab and the Patna Letters Patent. It gives the High Court power to make rules conferring on certain officers judicial, quasi-judicial and non-judicial duties. I think this is a very salutary provision, and I have often wished that a similar clause existed in the Allahabad Letters Patent also. There is a good deal of work which can very properly be disposed of by the Registrar of the High Court or some other officer of that standing, and which should not occupy the time of a Judge of the High Court. From actual experience, I have found that a good deal of the time of the Judges of the High Court is wasted on small matters which might very well be disposed of by the Registrar or some other officer. For this reason, I particularly welcome clause 42.

18. The last question that requires to be noticed is the question of court-fee. Under section 107-E of the Government of India Act, the High Court may settle tables of fees to be allowed to Sherriff's Attorneys and all clerks and officers of the Court. As Mr. Graham rightly points out this is not the same thing as paying court-fee under the Court Fees Act. The provision of section 3 of the Court Fees Act is, to my mind, of a very limited application. It is really a question of policy whether the provisions of the Court Fees Act with regard to the payment of court-fees on suits and proceedings generally should or should not be made applicable to the original side of the High Courts. Personally I am of opinion that they should be applied. I do not however wish to be dogmatic on this matter, and would leave it to the Home Department to decide.

No. 61.

The Burma Courts Bill.

(17th June, 1922).

(Legislative Department unofficial No. 357 of 1922).

In dealing with this Bill I do not propose to go into it clause by clause, as I am in agreement with most of the comments of Mr. Graham. There are, however, just a few important clauses which I propose to note upon separately.

2. *Clause 7.*—The pecuniary jurisdiction of the Township Court and the Sub-divisional Court seems to me to be very low. At the same time, as I am not familiar with the character and attainments of subordinate judicial officers in Burma, I do not wish to dogmatise. I have read the Minute of Sir Reginald Craddock and the Burma letter on this point. The Burma Government know their judiciary much better and if that is still the view held by them, I have nothing more to say.

3. *Clause 9.*—This has been dealt with at length by Mr. Graham in his note with special reference to clause (*c*). The view that the Local Legislature cannot confer jurisdiction on the High Court is beyond doubt. I have referred to it in the connected note on the Letters Patent and also in the Punjab Gurdwara Bill, and therefore I do not wish to repeat myself. I desire to call attention also to the proviso to clause 9. Under clause 7B the Sub-divisional Court has jurisdiction to hear and determine any suit or original proceeding of a value not exceeding Rs. 3,000 and it does not seem to me right and proper that suits of such small value should go in appeal directly to the High Court. This however is a question of policy, and it is for the Home Department to form their opinion on it.

4. *Clauses 10 and 11.*—In addition to what Mr. Graham has said on these clauses, I would say with special reference to clause 11 (1) that this gives a very much larger scope for second appeals in the Burma High Court than anywhere else. I know that the legal profession would welcome it. Indeed, even in the other High Courts I have found a desire among a considerable number of members of the legal profession that the law regarding the second appeals, as embodied in Section 100 of the Code of Civil Procedure, should be relaxed ; but I confess that I hold different views on this question. On the whole, Section 100 of the Code of Civil Procedure has, in my opinion, worked satisfactorily. No doubt there are some cases of failure of justice, but this is inevitable in any system of law. In actual practice, if we retain clause 11 (1), what will happen will be that there will be appeals to the High Court whenever a lower appellate court varies or reverses the decree of the first court, and these second appeals will have to be argued in the High Court practically as first appeals. Section 100 of the Civil Procedure Code will apply only when the second appeal is from a decree of a lower appellate court which has affirmed the decree of the first court, and only a question of law is raised before the High Court. Personally I am not in favour of such a large and extensive scope for second appeals, and it may be that this precedent may be quoted against us by other Provinces when the Code of Civil Procedure comes to be revised.

5. *Clause 21 (1).*—This clause does not seem to me to be quite consistent with the power given to the High Court in the Letters Patent to

admit such and so many Advocates, Vakils, Pleaders and Attorneys as they may think fit and proper to do. I would leave the High Court itself to frame rules on the subject in accordance with the provisions of the Letters Patent.

6. *Clause 27.*—As regards sub-clause (1) I am in agreement with Mr. Graham ; it is not illegal to provide that Magistrates exercising jurisdiction in the city of Rangoon when committing prisoners for trial shall commit them to the High Court. But I am a little doubtful as to sub-clause (2). Does this not amount to the local Legislature conferring jurisdiction on the High Court to hear appeals from Magistrates exercising jurisdiction in the city of Rangoon ?

7. *Clause 28.*—Sub-clause (1) seems to me to be superfluous and sub-clause (2) is *ultra vires*. Under the Letters Patent of the High Court, the Chief Justice and the Judges of the High Court can visit and inspect proceedings of civil courts subordinate to the High Court whenever they like. This is usually done by the Judges of the other High Courts also.

8. *Clause 29.*—I am inclined to think that the whole of clause 29 (1) is either *ultra vires,* or absolutely superfluous. All the matters referred to in the various clauses are usually regulated by the High Courts by their rules and such rules they frame under Section 107 of the Government of India Act.

As regards clause 29 (2) also, it would seem that it deals with the question as to who should be permitted to practise as petition writers in the courts of Burma. If it is necessary to penalise a breach of the rules by such petition writers, I have no objection. I should think the proper punishment in the case of a breach of any rules by a petition writer should be either suspension or dismissal ; and this the High Court I think could do by framing their own rules on the subject without legislation. I believe, though I am not quite sure, that there are some such rules in force in the Central Provinces and Sindh. I do not however recollect under what authority those rules have been framed.

No. 62.

Entertainment of matrimonial causes or suits among Muhammadans in the Courts of Kenya Colony and the East Africa Protectorate.

(19th June, 1922).

(Legislative Department unofficial No. 377 of 1922).

Ordinance No. 34 of 1920, passed in the Colony and Protectorate of Kenya, provides for matrimonial causes or suits among Muhammadans being entertained in the courts of that colony. The expression "Muhammadan marriage" is defined there as any marriage contracted in accordance with and recognised as valid by Muhammadan law. All Muhammadan marriages, whether contracted prior or subsequently to the commencement of this Ordinance are deemed to be valid marriages throughout the colony and the parties thereto are to be subject to the provisions of this ordinance and are entitled to any relief by way of divorce or otherwise which can be had according to Muhammadan law. Jurisdiction is conferred upon the High Court to entertain such suits or causes and then there is a proviso added to Section 3 (2). This proviso runs as follows :—

> "Provided always the High Court shall not exercise any jurisdiction as is hereby conferred unless both parties to the marriage are domiciled in the colony or protectorate of Kenya at the time of the institution of such matrimonial cause or suit as aforesaid."

2. In their letter of the 31st March 1922 the Kenya Government point out that there is a large population of Indians, Somalies and other Muhammadans who are clearly not domiciled there and among whom matrimonial causes arise. They further say that they are advised that the doctrine of jurisdiction based on domicile in matrimonial causes has no place in Muhammadan law. They point out that as a consequence of this view there is considerable hardship brought about, and they ask our opinion on this point.

3. The modern conception of domicile is, so far as I know, absolutely foreign to Muhammadan law. Indeed, it is not consistent with the basic theory of Muhammadan law. The following passage from Ameer Ali's Muhammadan Law (Vol. II, p. 180) sums up the position to my mind accurately :—

> "With the exception of certain principles, the operation of which is necessarily confined to the territorial limits of Islam, the Mussalman law is generally a personal law ; that is, its incidents remain attached to the individual Muslim, whatever the domicile, so long as he continues even outwardly faithful to the Islamic faith. 'A Mussalman' says the Kiyafa, 'is absolutely subject to the laws of Islam whatever the domicile. This is not the case with born Mussalmans alone. As soon as a person belonging to a different persuasion changes his faith for the religion of Mahomed and adheres to the Islamic system, all the civil obligations and duties which the Mussalman law imposes and the rights and privileges which it gives become attached

to the new proselyte. According to the Muhammadan law, therefore, a mere change of domicile, when unaccompanied by a change of system, effects no alteration in the status or legal capacity of Mussalmans."

Again, at pages 182 and 183, Mr. Ameer Ali observes as follows :—

"A Muslim may now acquire a foreign domicile without ceasing to be a Muslim. The new conditions of modern political necessities, when millions of Muhammadans are subject to non-Muslim Governments and are protected as *Mustamis* in the enjoyment of their civil rights and privileges, would also materially affect the ancient view of the Mussalman law. Under these new circumstances, a Muslim residing in one particular dependency where the laws of Islam are strictly enforced may remove to another part of the same Empire where the Islamic law would only be partially recognised, and yet acquire there a permanent domicile, without contravening the spirit of Muhammadan legislation. For example, a Muhammadan born within the territorial limits of British India may acquire a domicile in Great Britain or Ireland without ceasing to be a follower of the faith, as a change of domicile in this case would not imply or necessarily involve a change of allegiance." (When allegiance is spoken of under Muhammadan law, it does not necessarily mean political allegiance to a political sovereign. It means spiritual allegiance to the immutable laws of Islam and probably also to the head of the Islamic church). "It would seem that the early Islamic jurists had in view cases of this nature when they declared that while Muslims could not absolutely forego their original domicile they could remove from one province to another of the same Empire, subject to the same sovereign."

Whether, therefore, we accept the view of the ancient jurists or the modified view which now prevails by reason of the altered political conditions, it seems to me that once the fact of a Mussalman marriage is admitted it follows from it that the Muhammadan husband can, subject to the conditions prescribed in that behalf, divorce his wife wherever he may be.

4. As regards the question of divorce, there are strictly speaking 13 different kinds of divorce, of which 7 require a judicial decree and 6 do not, (see Baillie pages 293 to 360.) But in actual practice in India there are only three kinds of divorce which are practised. One is the *Talak* which proceeds simply from the husband or from the wife or some third person in pursuance of authority given by the husband. The second is divorce by mutual agreement which is called *Mubarat*. The third is the *Khula* in which the wife claims a divorce ; but she has to pay some valuable consideration to the husband to obtain her release. Whatever may have been the position in Muhammadan times as regards judicial divorce, I must say that during all my practice at the bar I never came across a single case of judicial divorce. There are only two cases which are reported on the subject. In the first case which is reported in I. L. R. 3 Madras, a Muhammadan lady sued for dissolution of marriage on the ground of cruelty and impotence. It was really a case of Khula. The decision is to my mind by no means a very satisfactory one. The next case is a Bombay case which was disposed of by Mr. Justice Strachey and Mr. Justice Tyabjee. This too is scarcely more satisfactory than the Madras case.

In this case also the wife sued her husband for dissolution of marriage on the ground of his impotency and malformation. The decision really turned on the question whether the husband was bound to provide funds to pay the cost of the wife's suit, and both the judges were of opinion that the rule which obtained in divorce proceedings in England had no application to the case of a Muhammadan wife. Except for these two suits in which divorce was prayed for, I know of no other case in which courts have granted decrees of divorce. Sir Roland Wilson, however, says that a Muhammadan marriage originally valid may be dissolved by judicial decree in British India on certain grounds. I personally think that having regard to the fact that under the Muhammadan law the Muhammadan husband can by repeating certain formula effect divorce, a suit for divorce would seem to be perfectly superfluous and unnecessary. I have, however, known and appeared in a number of suits for restitution of conjugal rights, but they stand on a different footing.

5. Having regard to the terms of Section 3 (2) it seems to me that the High Court at Kenya cannot exercise any jurisdiction in Muhammadan matrimonial causes unless both parties to the marriage are domiciled in the colony at the time of the institution of such matrimonial cause or suit as aforesaid. I personally am inclined to think that the more correct view from the point of view of Muhammadan law would be to make residence rather than domicile the basis of jurisdiction. It is obvious that the decision in Keyes, *v.* Keyes, (1921, P. D. page 203,) would have no application to the case of Muhammadans and it seems to me that if only the words " are domiciled " in the proviso to Section 3 (2) could be removed and the words " are resident " substituted for them, a decree which may be passed by the Kenya High Court is bound to be respected in this country as a decree passed by a court of competent jurisdiction in accordance with the provisions of Muhammadan law.

6. Lastly I may mention that when the Muhammadan law speaks of judicial divorce it certainly contemplates divorce by a *kazi,* and it seems to me that it is at least arguable whether in regard to a case of divorce a non-Muslim judge can be a proper substitute for a *kazi ;* but this is raising a very large issue, and it is by no means easy to give a conclusive opinion on that.

No. 63.

Question of the application of the Fugitive Offenders Act, 1881, to Indian States.

(22nd June, 1922).

(Legislative Department unofficial No. 86 of 1922).

In dealing with this file, I think it is necessary to bear in mind the precise nature of the question which has been raised by the F. and P. Department. There is every temptation to cover a large field in the discussion of this case, but it seems to me that if the question which has been raised is borne in mind, the area of discussion must necessarily be very limited.

In his note of the 5th of November last, Mr. Thompson has clearly stated the question for our opinion. I shall quote his own words :—

> " What is wanted is to provide means for extradition between Indian States and British Possessions outside India which would leave, as Mr. Glancy says, the extradition arrangements between Indian States and British India (and probably also those between States) unaffected."

The powers of the Indian Legislature to make laws are governed by Section 65 of the Government of India Act.

Under clause (*b*) laws may be made for all subjects of His Majesty and servants of the Crown within other parts of India.

Under clause (*c*) laws may be made for all native Indian subjects of His Majesty, without and beyond as well as within British India ; and

Under clauses (*d*) and (*e*) laws may be made for Government officers, soldiers, etc., and for all persons employed or serving in or belonging to the Royal Indian Marine Service.

It would thus appear that the laws which can be made under Section 65, clauses (*a*) to (*e*) are for certain classes of persons, and under no clause do I think could the Indian Legislature make any law which would be operative, excepting for the classes already mentioned, within the territories of Indian Princes.

2. The Governor-General in Council, as pointed out by Ilbert (see page 417), has in his executive capacity extra-territorial powers far wider than those which may be exercised by the Indian Legislature. In 1902 an Order in Council was passed under the Act of 1890, and it made provision for the exercise of foreign jurisdiction by the Governor-General of India in Council who may ' on His Majesty's behalf exercise any power or jurisdiction which His Majesty or the Governor-General of India in Council for the time being has within the limits of this Order.' The limits of this Order (*vide* Section 2) are the territories of India outside British India, and any other territories which may be declared by His Majesty in Council to be territories in which jurisdiction is exercised by or on behalf of His Majesty through the Governor-General of India in Council, or some authority subordinate to him, including the territorial waters of any such territories.

3. It is suggested that the Fugitive Offenders, Act, 1881 (Section 2 of which provides that where a person accused of having committed an offence in one part of His Majesty's dominions has left that part, such person if found in another part of His Majesty's dominions, shall be liable to be apprehended and returned in manner provided by that Act to the part from which he is a fugitive) may be extended to Indian States. The

Fugitive Offenders (Protected States) Act, 1915, expressly provides that it shall be lawful for His Majesty by Order in Council to direct that the Fugitive Offenders Act, 1881, shall apply as if, subject to the conditions, exceptions and qualifications (if any) contained in the Order, any place or group of places over which His Majesty extends his protection, and which is named in the Order, were a British possession, and to provide for the carrying into effect of such application.

Reading the Act of 1881 and the Act of 1915 in the light of the Order in Council of 1902, I think it is impossible to argue that Indian States are not States under the protection of His Majesty.

4. It is suggested in the notes of the F. and P. Department that in applying the Order in Council of 1902, it would be necessary first of all to establish that certain jurisdiction had been acquired by His Majesty by Treaty or grant, usage or sufferance, and this may not be possible to prove in the case of every Indian State. These words are always used in Acts which are intended to cover extra-territorial jurisdiction of the Crown. I think the words " usage, sufferance and other lawful means " are quite as important as the words " treaty and grant." If once it is conceded or accepted that Indian States do not possess the full attributes of Sovereignty and that they are under the protection of His Majesty, I do not think that the propriety of action under the Order in Council 1902 *vis-a-vis* such States could reasonably be challenged. So far as I am aware, from the time of Austin downwards no jurist (from a strictly legal point of view) has ever conceded that Indian States possess Sovereign rights within the meaning of that expression as it is understood in law. They may have, and many of them probably have, plenary powers inside their own territories, but that alone is not sufficient to make them Sovereign powers. They cannot enter into foreign relations directly ; they cannot make peace or war, and in point of fact they accept the Suzerainty of the British Crown. This being the position, I think that Parliament could legislate for them for certain purposes. The limits of Parliamentary legislation in relation to Indian States will be regulated more by rules of constitutional practice than by any abstract principles of law. I agree with the view that while Parliament may (and probably will) refuse to legislate for purely domestic matters in Indian States, it will be the only proper legislative authority for making any law which really partakes of the nature of a Treaty with a foreign nation by reason of the fact that it provides for reciprocal treatment. That such jurisdiction has been assumed by Parliament in legislation of certain character, there is no room for doubt. The Copyright Act of 1911 is an instance in point.

5. I am aware of the *dicta* of Jenkyns and Hall that under the Foreign Jurisdiction Act, jurisdiction does not arise through the Act, but is recognised by it as having belonged anteriorly. The view that I also take is that such jurisdiction vests in His Majesty independently of the Act by reason of the Suzerainty that belongs to him, and that the Act is only the machinery for the exercise of that jurisdiction. Indeed, the preamble to the Foreign Jurisdiction Act, 1890 and the Order in Council, 1902, shows that the jurisdiction vests already in His Majesty. If this view is correct, as I think it is, then it seems to me that the Fugitive Offenders Act of 1881 and 1915 may well be extended by an Order in Council of His Majesty to Indian States, and such extension will not, in my opinion, be an invasion of such Sovereign rights as those States may possess internally.

No. 64.

Eligibility of Ministers for leave of absence; whether a Minister is a servant of the Crown.

(25th June, 1922).

(Legislative Department unofficial No. 455 of 1922).

I think it is difficult to hold that a Minister is a servant of the Crown. He is appointed under Section 52 of the Government of India Act by the Governor of a Province and holds office during his (the Governor's) pleasure. Under Section 96B "every person in the Civil Service of the Crown in India" holds office during His Majesty's pleasure. The very fact that a Minister holds office during the pleasure of the Governor, while a Member of his Executive Council holds office during the pleasure of His Majesty, is significant. Besides, it would be putting too much strain on the word "service" to hold that a Ministry is a "service" in the technical sense of the word. It will also be noticed that under Section 96B (2) the Secretary of State in Council may make rules for *regulating the classification of the Civil Services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct.* All this is obviously inapplicable to the case of a Minister and can only apply to the "services." The provision for the salary of a Minister is made by Section 52, and it is open to the Legislative Council of the Province (not the Secretary of State in Council) to rule that the Minister shall get a salary smaller than that of a Member of the Executive Council.

I do not think that Section 94 which provides for leave can or was intended to apply to the case of a Minister. I think that he is not a person in the service of the Crown in India. It is remarkable that there is no separate provision for leave being granted to a Minister, but I imagine this was not due to an accident. It is not, as Mr. O'Donnell points out, the practice to grant leave to a Minister, and I entirely agree with him when he says that "the principle of Ministerial responsibility seems to require that a Minister should always be in a position to answer for his acts in the Legislature, or at least that the Government of which he is a Member shall be in a position to do so.

I think it would be difficult to hold that the word "vacancy" in the proviso to Section 52 (3) has any reference to the state of things created by a Minister going on leave. On the other hand, Section 92 expressly provides for the Governor-General in Council appointing some person to be a temporary Member of Council when a permanent Member is absent on leave.

Should a Minister require to be away from his work for a short time to take rest or for some other urgent private reason, I have no doubt that his Governor will allow him to do so, but that will not amount to "leave," as that expression is understood in the technical sense.

No. 65.

Production and inspection of Government Securities under Section 22 of the Indian Securities Act.

(29th July, 1922).

(Legislative Department unofficial No. 548 of 1922).

It is quite clear that under Section 94 of the Code of Criminal Procedure, any court may, whenever it considers that the production of any document is necessary or desirable for the purpose of investigation, enquiry, trial, or other proceedings under the Code, issue a summons to the person in whose possession or power such a document or thing is believed to be, requiring him to attend and produce it. The Third Presidency Magistrate of Calcutta appears to me to have taken action under Section 94 when he ordered the production of certain Government Promissory notes which were in the possession of the Public Debt Office. Under Section 162 of the Indian Evidence Act, the officer summoned to produce a document is bound to bring it to court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection is a matter for the decision of the court. Section 94 (3) itself provides that nothing in this Section shall be deemed to affect Sections 123 and 124 of the Indian Evidence Act of 1872.

2. Section 124 of the Indian Evidence Act may be ruled out as having no application to the circumstances of the case. Section 123 simply provides that no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. I am of opinion that Section 123 also will not apply to the circumstances of this case. The Government Promissory notes cancelled by renewal, which were required to be produced, do not appear to me to fall within the expression "any affairs of State" and I do not think that a court would be justified in ruling out this evidence under Section 123 of the Evidence Act.

3. It would be putting too much strain upon the language of Section 22 of the Indian Securities Act, 1920, to hold that a court of law was debarred from calling for the production of a Government security. I am in entire agreement with Mr. Casson in thinking that it is impossible to construe the words "no person" in that Section as including a court entitled to proceed under Section 94 of the Code of Criminal Procedure. Indeed I feel more strongly than he does about the interpretation of Section 22. The opening words of that Section, *i.e.*, "no person shall be entitled to inspect or to receive information, etc., etc.," interpreted in a natural way would strike any lawyer as having reference to a private individual, and Rules 39 and 40 framed in accordance with the powers conferred by Section 24 of the Indian Securities Act, still further confirm this view. Rule 39 speaks for any person requiring information to apply to the Public Debt Office in writing. Rule 40 too has been so framed as to be consistent only with the view that the application referred to therein must be taken to be the application of a private individual ; and Rule 41 requires that every applicant, before any information is supplied to him under Rule 39 or 40, has to pay a

fee of one rupee for each security in respect of which any information is supplied and must execute a Bond of Indemnity also. All this can obviously have no application to a court of law which requires the production of a security during the trial of a case.

For the above reasons, I am in agreement with the view taken by Mr. Casson. If, however, it is considered necessary or desirable to protect these documents from inspection by the courts, then, as Mr. Wright suggests, some amendment of the law would be necessary. I also share his doubt as to the advisability or propriety of such a prohibition.

No. 66.

Appeal by Mrs. N. C. Thomas, and Messrs. H. R. W. Anderson, L. B. Thomas, H. S. Thomas and W. R. Davies, against the decision of the Controller of Patents in refusing to accept their patent application.

(9th August, 1922).

(Legislative Department unofficial No. 596 of 1922).

This is a somewhat troublesome case. It appears that on the 7th September, 1916 :—

(1) Richard Beaumont Thomas ;

(2) Hubert Spence Thomas ; and

(3) William Robert Davies,

applied for a patent in Great Britain which was granted to them. Of these three persons, Richard Beaumont Thomas died on the 14th February 1917, and probate of his will was granted in England on the 17th of April 1917, to :—

(1) Mrs. Nora Constance Thomas (the widow) ;

(2) Henry Robert William Anderson ; and

(3) Lionel Beaumont Thomas.

The three executors named above and Hubert Spence Thomas and William Robert Davies, the two original grantees of the patent who had applied for patent on the 7th September 1916, in England, have made an application for a patent in British India and have applied for a priority of the British patent to be granted to them under Section 78A of the Indian Patents and Designs Act, 1911, as amended by Act No. 29 of 1920 and the Temporary Rules. The delay in the submission of the application appears to have been condoned under the Indian Patents and Designs Temporary Rules, 1915. The Controller of Patents, however, refused to accept the application on the 25th of May, 1922, on the ground that the application was made by the legal representatives of one of the parties to the British application and not by the original parties thereto, and that the words " any person " in Section 78A, sub-section (1) could not include the legal representatives of a deceased patentee.

The applicants have now appealed to the Governor-General in Council under Section 5 (2) of the Indian Patents and Designs Act, 1911. The only point involved in the case is as to whether the interpretation of the words " any person " in Section 78A by the Controller is correct.

2. I agree with Mr. Casson that the question as to whether the words " any person " in Section 78A include legal representatives, does not really arise in this case, and we need not go into that question at all. My attention has been drawn to the English case of Shellenberger (*vide* Law Reports, Patent Design and Trade Mark Cases, Vol. VI, page 550). It was a case in which Shellenberger to whom patent was granted in America, assigned his rights to one George Westinghouse who in his turn appointed a man William Phillips Thompson as his agent to take out a patent under the International Convention in England. The Attorney-General in that case held that the only person who was entitled to claim that ' dating-back ' was the applicant in the foreign country in his own

name. This is a perfectly intelligible ground but I think this case cannot be treated as being on all fours with the case before us. In the present case, there is the fact that the Indian application has been made by two of the original applicants in Great Britain and the executors of the third who has since died. Even assuming that the executors are not entitled to make this application under Section 78A, is there any reason for holding that the two surviving applicants for patent in England cannot make this application under Section 78A ? I think there is no such reason. It seems to me that as survivors they are entitled to make that application.

3. We are not concerned with any question which may arise between the surviving patentees and the executors of the deceased. That is a matter to be settled between them. The Australian case referred to laid down that the right of priority was like any other right and could be transferred and dealt with by the owner of the right in the same way as he could transfer or deal with any other right—which belonged to him. It turned upon the interpretation of Section 121 of the Commonwealth Patent Act. It is in direct conflict with the English decision, and if we have to choose between the two, I should certainly follow the English decision. But as I have said above, the point which arose in both the English and the Australian case does not appear to me to arise in the present case.

I therefore agree with Mr. Graham, that the grant should be made in the name of the survivors among the co-applicants, and we should leave the legal representatives of the deceased co-applicant to establish their claim in equity.

L149LD

No. 67.

Question as to the legality of the flying of the Swaraj Flag on the Municipal Building at Jubbulpore.

(9th August, 1922).

(Legislative Department unofficial No. 901 of 1922).

The question in this case is one of considerable difficulty and such books on constitutional law as I have consulted do not render much assistance in solving the question. What appears to have happened in the present case is that the Jubbulpore Municipality put up on its building a Swaraj flag in honour of the members of the Civil Disobedience Inquiry Committee, to whom they wanted to present an address. From the previous files I find that the question attracted the notice of the Government of India also in 1917, when a pleader in Gaya put up a Home Rule flag, and when Mrs. Besant also did the same thing during her internment. It appears that in 1908 Earl Howe put the following question in the House of Lords :—

> Earl Howe : My Lords, I rise to ask His Majesty's Government, with a view to removing any possible doubt that may exist on the subject, whether it is a fact that the full Union Jack may be flown on land by every citizen in the Empire as well as on Government Offices and Public Buildings.
>
> The Earl of Crewe : My Lords, the noble Earl asks me, with a view to removing any possible doubt that may exist on the subject, whether it is a fact that the full Union Jack may be flown on land by every citizen in the Empire. As many of us know, there has existed in the public mind a curious confusion as to what flags may be flown and what may not. At one time it seemed to be believed that the Royal Standard could be flown anywhere and by anybody. That, however, as we now know, is not the case. It was formally announced that the Royal Standard is the personal flag of the Sovereign, and cannot properly be flown without His Majesty's permission, which is only granted when either the King or Queen is present. But, of course, a very different state of things applies to the Union Jack. I think it may fairly be stated, in reply to the noble Earl, that the Union Jack should be regarded as the National flag, and it undoubtedly may be flown on land by all His Majesty's subjects.
>
> The Earl of Meath : My Lords, I am very pleased indeed to hear from His Majesty's Government the statement that the Union Jack may be flown on land by all British subjects. There has been a certain amount of doubt on the subject, and it is as well that it should have been set at rest. It is rather curious that a British citizen is about the only one who is not quite certain under what flag he really stands as a private citizen ; and I have known of some instances in this country where the Union Jack has actually been pulled down by the police. I am obliged to His Majesty's Government for having definitely cleared up this matter.

There is, therefore, no doubt whatsoever that the Union Jack may be flown on land by every citizen in the Empire as well as on Government

buildings. To use the words of Lord Crewe, the Union Jack should be regarded as the National flag. If that is so, the flying of any other flag as a rival flag or as indicative that the person or persons concerned do not recognise the Union Jack as the National flag would to my mind amount to an unconstitutional practice, even though there might be some doubt as to whether it would be illegal. I may add that this was the view which I expressed myself to Mrs. Besant so far back as 1917 ; and upon a further study and consideration of the question I feel stronger in that opinion.

2. It is also necessary to point out that it is very common in this country to fly flags on temples or on the banks of sacred rivers. Most of these flags have some sort of emblems and they are flown by priests generally with the object of attracting pilgrims or clients. The whole riverside at the confluence of the Ganges and the Jumna at Allahabad is full of flags of this description and I have seen myself peculiar emblems painted under the Union Jack. I had an interesting case in the Allahabad High Court in which the question was whether there could be any right of property in the emblems on flags of this description. I do not know how the case has been disposed of as I left it unfinished. Cases relating to flags for commercial purposes appear to have arisen in America also and in one case the Supreme Court held that an act of a State of the Legislature which prohibited the American flag from being used for purposes of business advertisement did not encroach upon any right which is protected by the constitution of the United States. (See Watson on the Constitution, Volume I, page 543) It is quite clear, however, that flags used for religious or commercial purposes stand on an absolutely different footing from flags used for political purposes. Mr. O'Donnell has hinted at Section 124A in this connection and has referred to the words " visible representation " in that section. It is impossible to give a definite opinion in the absence of concrete facts, but I am not prepared to exclude the possibility that the flying of a Swaraj flag may, in certain circumstances, and especially when it is clear that the object of putting up such a flag amounts to a refusal to recognise the Union Jack and all that it stands for and is intended to bring His Majesty or the Government established by law in British India into contempt or to excite disaffection towards His Majesty or the Government, may amount to sedition. On the other hand it may very well be argued that a Swaraj flag is not necessarily hostile to the Union Jack, as Swaraj is now the accepted policy of His Majesty's Government and has found a place in the message of His Majesty delivered through His Royal Highness the Duke of Connaught at the opening of the new Legislature. It will, therefore, appear that much will depend upon the circumstances in which the Swaraj flag is flown, the occasion on which it is flown and the object with which it is flown.

3. So far I have dealt with the question generally. Coming now to the flying of Swaraj flags by municipal bodies, there is no doubt there are certain powers of control reserved by various local Municipal Acts to the Collector or the Commissioner or the local Government. Assuming that a local Government (and here I am speaking generally) in the exercise of that control prohibits the flying of such a flag and the municipality so prohibited persists contumaciously in flying the flag, it is possible to take the extreme step of superseding it for a definite

period. As to whether this should be done in any particular case would be a question of policy on which I express no opinion. I agree with Mr. Graham that even where action is permissible under a Municipal Act such action is of an exceedingly dilatory nature and wholly unsuited to the demands of the case, and that it is safe to infer that this was because it was never intended that the powers should be used by the controlling officer for an object of this kind.

4. I shall now deal with some of the local Acts.

* * * * * *

I do not wish, however, to note further on these Municipal Acts. It seems to me that though action might be taken under some of these Acts, I hardly think that a contingency such as that which has now arisen was ever under the contemplation of the framers of these Acts. I agree that the local Government has other means of exerting pressure on the municipalities and local boards. Nearly every one of them looks up to the Government for grants, and I think that in the case of a municipality which is not past redemption a threat to withhold such grant may have the desired effect.

No. 68.

Causes of Delay in Civil Courts.

(20th August, 1922.)

(Legislative Department unofficial No. 532 of 1923).

In dealing with the question of delay in civil litigation in India, it is impossible to refer to any one cause as either the sole or the main cause for the protection of litigation. I think it will be more convenient to deal with the subject first with respect to conditions prevailing in subordinate courts and then with respect to High Courts.

I.—Subordinate Courts.

(1) Almost everywhere the complaint is that the Judiciary is understaffed or under-manned. Speaking from my knowledge of the United Provinces I can say that the number of cases which an ordinary Munsiff—the lowest grade of civil Judge or a Subordinate Judge—disposes of in the course of a year, is very much larger than he can reasonably be expected to do. I believe the complaint is universal in India.

(2) There is undoubtedly a tendency on the part of legal practitioners to multiply the number of witnesses examined in cases and not infrequently to cross-examine them at inordinate length. I believe the inability of courts to check those inordinately lengthy cross-examinations arises from several causes.

(3) Very frequently I have found that at the start of a case, the subordinate judge is supremely ignorant of facts and pleadings in the case and the real issues arising in it. This is mainly due to the fact that though the law requires that the case should be opened, it is in actual practice very seldom opened. In the Province of Agra the pleaders are not accustomed to it, and I have found many of them holding the view that it is extremely dangerous to lay your cards on the table at the start of the case. I have also found subordinate judges holding the view that it is waste of time to open the case. The result is that if a point arises during the trial as to the relevancy or admissibility of any evidence, the subordinate judge is either unable to come to a decision then and there, or does not want to take the risk until he has mastered the whole case which he usually does when the case comes to be argued on both sides and sometimes even later. It is by no means infrequent to come across the remark by the Judge that evidence which is objected to by one party, is admitted "subject to decision at the time of argument." I very well remember Sir John Stanley and Sir Henry Richards in civil cases commenting very severely upon practice of this sort, but their strictures had little effect. I think the position in Oudh in this respect is better, as my experience there has been that subordinate judges usually comply with the requirements of law so far as the opening of a case is concerned. I have not much experience of other parts of India, but I have heard that excepting when the Counsel from High Courts appear in subordinate courts, it is very seldom that there is an opening of the case.

(4) I may add that documents which are produced as evidence in the case are very frequently marked as "Exhibits" in the case after the judgment is written, and sometimes even later, and not at the time when they are proved. This, too, is a practice which, to my knowledge, has been condemned by several judges of the Allahabad High Court.

(5) In importance cases before subordinate judges involving large pecuniary interest or intricate questions of law and fact, senior Counsel from High Courts are sometimes engaged, and I have found very few subordinate judges being able to exercise necessary control over the conduct of such cases by senior Counsel.

(6) An extraordinary amount of time is wasted over the service of processes. Much of it is no doubt excusable inasmuch as the distances at which parties or witnesses live are great, and there are serious transport difficulties in the interior. At the same time it must be borne in mind that if a party desires to prolong litigation—and not unoften the tactics of delay are adopted with a view to tire the patience of the other party or to put him to loss of money—he can do so easily by getting at the process-servers who are an extremely ill-paid staff. Anyone who has practised in subordinate courts knows that it is a matter of common notoriety that you cannot get a process served without paying something to the process-server. Corruption among them is, to my mind, beyond all doubt, while the supervision is not as strict as it might well be.

(7) The habit of seeking adjournments on grounds which are not often of a satisfactory character, is very common in the mofussil. Very often it so happens that witnesses are summoned to appear in courts just a few days before the commencement of the actual trial. When they or some of them do not appear in the court on the day of trial, either because they have not actually been served with summons or because they have been served too late, or because they are colluding with the party who does not want to go on with the case on which it is fixed, an application is made for an adjournment which is very often granted subject to payment of costs for such adjournments. I know strong judges refuse to adjourn cases on such grounds, but the number of such judges is not very large. I think this defect can be remedied if the High Courts frame and enforce rules (which, to my mind, they have power to do) fixing the time-limit within which parties must put in an application for service of summonses.

II.—Causes attributable to our state of law.

There are several legal causes which, to my mind, are as responsible for abnormal delays as either the weakness of the judges or the laxity of the Bar.

(1) Although the present Civil Procedure Code lays considerable stress on precision and exactness in pleadings, and although the Bar in the mofussil is far more educated and far more competent than it was say forty years ago, yet Indian courts are much more indulgent than they should be in the matter of pleadings. In the olden days when legal education in India had yet to be developed, the Privy Council laid down in some cases that courts in India should not be very strict in construing pleadings. Although conditions have, to my mind, absolutely changed, yet the courts continue to follow the dicta of the Privy Council in those old cases. Looseness in pleadings, to my mind, is a fruitful source of unconscionable delays in this country.

(2) Our whole system of registration is defective. Even though a registered mortgage deed may recite in so many words the fact that consideration has been paid, yet our system allows the defendant to deny the fact that he has received consideration, and even in ordinary suits this

necessarily involves considerable delay. I have given this only as an illustration.

(3) The method of proving private and public documents laid down by the Indian Evidence Act requires, to my mind, careful revision. I have come across cases in which a party producing documents which are obviously perfectly genuine, meets with the greatest difficulty in getting them admitted in evidence because the other party light-heartedly or vexatiously puts the former to proof. In the mofussil nothing is more common than pleaders of one party denying the genuineness of the documents produced by the other party.

(4) The worst delays take place when evidence is recorded on commission or when accounts are referred to a Commissioner. I have frequently noticed very serious abuse of the right of cross-examination of witnesses before Commissioners, and I have also known of cases which have taken months and months to be heard and disposed of merely because the accounts have been referred to a Commissioner, for examination. I can recollect a case in which I myself appeared in its last stages in the High Court which was filed in 1905 and not disposed of until the beginning of this year during my absence from the profession.

(5) It is also a question for consideration whether the provisions of O.-37 of the Code of Civil Procedure, which prescribe summary procedure for cases relating to Negotiable Instruments (more or less in accordance with English practice) should not be extended to subordinate courts. As the law stands at present, it applies only to the High Courts of Calcutta, Madras and Bombay, as also to the Chief Court of Lower Burma and the Court of the Judicial Commissioner of Sind. I think the time has come when it should be extended to important towns in every province. In the United Provinces I would extend it to such important towns as Cawnpore, Aligarh, Agra, Benares, Lucknow, Meerut and Moradabad. These are the districts where generally we have cases relating to negotiable instruments. Indeed I am of opinion that at important commercial centres, we must have Commercial Judges to dispose of commercial cases. The ordinary procedure prescribed for what are known as "title suits" in India is not to my mind, suited for such cases ; nor can an ordinary subordinate judge deal with commercial cases as expeditiously and effectively as a specially trained commercial judge can.

(6) Considerable time is wasted over perfectly idle appeals from interlocutory orders, such as an order granting or refusing to grant an injunction, or appointing or refusing to appoint a receiver ; and it sometimes happens that an interlocutory order is invited only with a view to cause delay in the hearing of the case, but I am not prepared at present to make any specific suggestions with regard to the stiffening of our law in this respect though I do feel that this is a matter for careful investigation and enquiry.

III.—Other defects in Legal System.

(1) I shall now deal with certain other features of our legal system which, to my mind, are to a great extent responsible for unnecessary and ruinous litigation involving considerable expenditure of public time.

First of all our whole system of execution of decrees has the inevitable effect of prolonging litigation. Our Law of Limitation relating to decrees provides so many subterfuges and so many excuses for prolonging execution, that it is a surprise to me that decrees are sometimes speedily executed.

Ordinarily, a dishonest decree-holder or a dishonest judgment debtor can if he so desires, choose his own time when he will execute the decree or allow the decree to be executed.

To illustrate my point with reference to the provisions of the Law of Limitation as applicable to execution cases, the expression " a step in aid of execution " in article 182 is a standing temptation to dishonest attempt both on the part of decree-holders and judgment-debtors.

I strongly feel that the time has come when some drastic steps should be taken to revise our whole system of execution of decrees and to place it on a more satisfactory footing.

(2) Intimately connected with this is the question of the periods of limitation prescribed for suits and applications by the Limitation Act. Old titles are sometimes disturbed merely because our Law of Limitation is so indulgent. One of the commonest class of cases is represented by suits filed by reversioners to set aside alienations made by a Hindu widow without any legal necessity. Now a Hindu widow may survive an alienation made by her for a period of fifty years. The law allows the reversioner twelve years from the death of the widow. Only recently I recollect reading a case in the Privy Council Reports in which an alienation made between 70 and 80 years ago was sought to be set aside. I have appeared in numberless suits of this description in which alienations of 30 to 40 years back were attacked. These cases lead to any amount of false evidence because the genuine evidence has disappeared and they lead to a congestion of work in our courts, so that dishonest suitors are obstructed in getting their cases disposed of as quickly as they might have been but for these stale claims.

(3) I shall now refer to the evils of *benami* system. The system of *benami* transactions has been repeatedly recognised by the Privy Council and by the High Courts in India ; but every lawyer in India knows that *benami* purchases are sometimes used as weapons of offence and defence against honest third parties. There is, to my mind, need for the reform of our law in this respect.

(4) In India, speaking generally, there is no law against champerty, and the Privy Council and High Courts have entertained champertous claims. While no doubt some poor and genuine claimants have every reason to be grateful for the present state of law, I have no doubt that the laxity of it has led to great abuses. In important cases relating to big estates there is always a speculator appearing on the scene, and it is a matter of common notoriety that in Oudh the moment a taluqdar dies without leaving any lineal male heir, half a dozen speculators appear on the scene to foment litigation, make money out of it, and if in the end the poor and impecunious claimant who has sought their help, succeeds in the case, he gains very little. I believe the time is ripe for legislation in regard to champerty.

(5) I shall now refer to cases relating to talukdar estates in Oudh which are governed by Act I of 1869 passed by the Indian Legislature ; and to cases relating to impartible estates. These are the most troublesome cases and take years and years to dispose of. The issues involved are sometimes exceedingly complicated and usually some sort of custom is set up which throws open the floodgates of evidence. The whole law with regard to impartible estates is in such a state of uncertainty and confusion that I think no lawyer can feel sure as to what may happen in a

particular case. It was expected that the Privy Council would avail themselves of the opportunity of settling law in a recent appeal which went up to them from the Allahabad High Court. I know the case very well as I was Counsel for one of the parties when it was before the High Court. I believe the result of the decision of Their Lordships of the Privy Council will be to create still greater uncertainty, and a learned writer in a recent book has very severely criticised this decision. I think it is for the Provincial Governments to make an enquiry into the history and conditions of tenure of these big estates and to legislate for them. My recollection is that many years ago the late Sir Bhashayam Ayangar, perhaps the foremost lawyer of his day in India, introduced a Bill on the subject in the Madras Council, but I have not been able to discover whether the Bill was passed into law. As regards the Oudh Taluqdar Act, I can only say that it has been and is the despair of every lawyer and judge who has had to deal with that Act. I have appeared in a number of taluqdar cases, and I feel that no Act of the Indian Legislature has done more to promote litigation than this Act has. In Oudh during the last ten years one Special Judge, Pandit Seetla Pershad Bajpye, has been appointed to dispose of these cases, and he is at the present moment trying a case in which I was approached by one of the parties so far back as 1918. I believe it was filed in 1919 or 1920, and Mr. Bajpye who met me at Simla only a few weeks ago, told me that for the last one year and nine months or thereabouts he has been recording only the evidence in the case and that it would take him several months before he would be able to deliver his judgment. This is by no means a singular instance. If necessary, I can mention at least a dozen cases off-hand which have taken about a year or more to be disposed of. I once brought the unsatisfactory character of this Act to the notice of Sir James (now Lord) Meston but that was during the war. It is for the United Provinces Government to consult the taluqdars and to make up their mind as to what they would like to do with this Act. I for one think that instead of the Act being a blessing to the taluqdars, it is a curse to them, and the only class of people who stand to gain by its continuance on the Statute-book are the members of the legal profession.

IV.—Causes of delay in High Courts.

(1) I will now come to causes of delay in the High Courts. In India I believe there is scarcely a High Court at the present moment which is not suffering from a very serious congestion of work. My own belief is that, at any rate in some High Courts, the number of Judges will have to be increased.

(2) In the High Courts records are translated, and in many cases which are above a certain pecuniary value they are also printed. The Translation Departments are, I am told, understaffed. It was certainly the case in Allahabad when I practised there.

(3) Much of the delay in the High Courts is caused by the time taken in getting notices on parties served. Very often it happens that notice after notice is returned unserved because the correct address of the opposite party has not been given. I think much of this evil might be remedied if the High Courts could frame rules for the registration of addresses. I believe the Madras High Court has framed a rule on the subject.

(4) Again, delay is caused by proceedings for the substitution of heirs of deceased parties or for the appointment of guardians or next friends of minors.

(5) The system of translation and printing, too, requires overhauling. It is not necessary that every single document should be translated and printed, and so far as this part of the work is concerned, it is, I am afraid, done more or less perfunctorily. At any rate, this was my experience in Allahabad. The record is overloaded with totally unnecessary documents which are not even referred to by Counsel during the argument. The Privy Council have also repeatedly commented upon the future of our records. Sometimes it happens that in order to prove whether a family is joint or divided, or to prove a certain custom recorded in village papers, a large number of revenue papers are translated and printed. Only a few by way of sample may very well do. I very well remember a case in which I appeared in 1915 or 1916. The value of the suit was only Rs. 12,000, the cost of translation and printing in the High Court came to something like Rs. 8,000 or Rs. 9,000. The only point in the case was as to whether daughters were excluded from inheritance among Jats in the Meerut district. Probably the responsibility for much of this mechanical part of the work could easily be transferred to the shoulders of the parties themselves.

I do not wish to be dogmatic about my suggestions. I would only make the suggestion that the matter is one which requires very careful examination and scrutiny. Only recently I have read in some newspapers articles complaining of the delays, but I have no doubt that within a very short time the congestion of work and the delays that take place in civil courts will have to be seriously tackled.

I would therefore suggest that a committee may be appointed to consider the whole question and to submit their recommendations to the Government. It is necessary, in my opinion, that it should be a strong committee and should be presided over by a Judge of a High Court.

No. 69.

Action to be taken in regard to prisoners who resort to Hunger Strike.

(12th September, 1922.)

(Legislative Department Confidential File No. 596).

I have read the decision of Lord Alverstone, C. J., in the case of Leigh *versus* Gladstone, (Times Law Reports XXVI, page 139.) It was an action claiming damages for assault and for an injunction to restrain repetition of the acts complained of, brought by Mrs. Marie Leigh against (1) the Right Honourable Herbert Gladstone, Home Secretary, (2) Captain Percy Green, Governor of Winson Green Prison, Birmingham, and (3) the Medical Officer of the same prison. The defence was that the acts complained of were necessary in order to save the plaintiff's life, and that the minimum of force was used.

2. It appears that the plaintiff was convicted of resisting the police and disturbing a meeting held by Mr. Asquith in connection with the woman's franchise movement. The plaintiff in this case was examined at length. She said that at a very early period of imprisonment she was put under prison punishment for breaches of prison discipline, she was eventually subjected to forcible feeding, sometimes through the mouth and sometimes through the nose. In these circumstances the Lord Chief Justice said that he should rule as a matter of law that it was the duty of prison officials to preserve the health of the prisoners in their custody and *a fortiori* to preserve their lives, and that he should ask the jury whether the means adopted were proper for that purpose. In summing up the Lord Chief Justice laid down the law as follows :—

> " It was the duty, both under the rules and apart from the rules, of the officials to preserve the health and lives of the prisoners, who were in the custody of the Crown. If they forcibly fed the plaintiff when it was not necessary, the defendants ought to pay damages. The plaintiff did not complain—and it did her credit—of any undue violence being used towards her. The medical evidence was that at the time she was first fed it had become dangerous to allow her to abstain from food any longer. If Dr. Helby had allowed the plaintiff to fast for a few days longer and she had died in consequence, what answer could he have made ? "

This is the material portion of the judgment. The proposition that it is the duty of a medical officer to preserve the health of a prisoner in his charge and *a fortiori* to preserve his life, may readily be accepted. It is really the manner in which that duty is to be discharged and the extent of that duty which have caused me some trouble. If a prisoner refuses to take food and deliberately goes on a hunger-strike, we may assume that the officer concerned will have done his duty if he places the food within the prisoner's reach. If, however, the prisoner still persists in refusing to take food and the doctor then is of opinion that if food is not administered to him forcibly, he will die, it may be taken as settled upon the authority of Leigh *versus* Gladstone that it becomes the duty of the doctor to forcibly feed the prisoner. To quote the words of Lord Alverstone : " If Dr. Helby had allowed the prisoner to fast for a few days longer and she died in consequence, what answer could he have made ? "

3. In the case of Leigh *versus* Gladstone, it appears that the food was administered to Mrs. Leigh while she was still conscious. She stated in her examination that she was tied to the chair with a towel and held there ; then she was taken to an observation cell and put into the bed, where she remained until the evening. In the evening she was forced on to the bed and Dr. Castles produced a feeding-tube. The tube was inserted into one of her nostrils, she resisting with all her might. Great pressure was used, but the tube produced such great pain, as was evident to the doctors, that it was withdrawn. All this was justified on the ground that if the doctors had refrained from applying this much force, she would have died. It seems to me to follow from this reasoning that if, while the prisoner is conscious, it becomes the duty of the doctor at a certain point of the prisoner's struggle against food, to forcibly feed him, the duty will be all the greater if as a result of persistent refusal to take food, the prisoner becomes unconscious and it becomes clear to the doctor that without forcible feeding the prisoner may die.

4. I confess that I had considerable doubts as to the duty of the doctor and its limits ; but I feel myself over-borne by the authority of Leigh *versus* Gladstone, and having studied the case carefully I have felt myself compelled to adopt this opinion. Of course whether the minimum of force was used in any particular case, or whether it was necessary to resort to forcible feeding, would be questions of fact. But assuming that it is proved in a case that without forcible feeding the prisoner would have died and that in feeding the prisoner forcibly, the minimum of force was used, it seems to me that no civil or criminal liability would attach to the doctor.

No. 70.
(I-II.)

Jurisdiction over railway lands in Indian States.

I.

(29th September, 1922.)

(Legislative Department unofficial No. 685 of 1922).

I agree with Mr. Graham that so long as full sovereignty over the lands occupied by railways in Native State territories is not ceded, these lands do not form part of British India, and no person can be arrested on such lands in respect of offences alleged to have been committed in British India unless provision has been made to that effect in the law applying to such lands.

In his note of 21st September 1922, Mr. Thompson asks this Department to advise the Political Department on two questions :—

(*i*) whether we think that the decision in the case of Radha Kishen, the Naib-Tahsildar, who was arrested at the Gwalior railway station, was wrong, and

(*ii*) what action should be taken to insure that in cases of this sort, Government is adequately represented.

As regards the first question, I have not been able to find the judgment of the Lahore High Court on the file. In the absence of that judgment it is impossible for me to say whether Mr. Justice Martineau took a right view of the facts of the case.

As regards the second question, all that I can say is that it should not be difficult for the Government of India to be represented in the High Court, if only the Lahore High Court would adopt the practice, which is very often followed in other High Courts, of giving notice to the Government Advocate to put himself in communication with the Government of India and to represent them whenever any question of relation between them and any Native State is put in issue in any case. I remember several instances in which Judges of the High Court at Allahabad expressed the wish that they would like notice to be served on the local representatives of the Government, although the Government was not directly a party. In the present case, it seems to me that the question was certainly one in which the Government of India should have been represented. I presume that the Government Advocate at Lahore appeared in the case, and I cannot understand why, if he appeared in the case, he did not put himself in communication with the Government of India. It is true that the Government Advocate represents the Local Government ; but still it should not have been difficult for him to bring a matter of this character to the notice of the Government of India. Personally I think it would be useful to find from the Government Advocate or the Punjab Government as to what the usual practice in such cases in the Punjab High Court is.

Since I signed the above note, Mr. Graham has shown me the decision of Martineau J. reported in Indian Law Report, Lahore, page 406. I have read the decision carefully. It follows the decision of the Privy Council in Mohammad Yusuf-ud-din case (I. L. R., 25 Cal. 20). I think Mr. Justice Martineau was quite right in the view he took, and upon the

facts of the case no other view was possible. I note that the Crown was represented in the case, and upon the facts of it, it seems to me that a reference by Counsel to the Government of India was unnecessary.

2. The amendment of the Code of Criminal Procedure as suggested by Mr. Graham would (I may add) solve such difficulties, provided of course the Indian States agreed.

II.

(30th December, 1922.)

I have again read the noting in the Foreign and Political Department and in this Department. I agree with Mr. Graham that in each case it will be a matter of fact whether the cession amounts to cession of full and exclusive criminal jurisdiction. In every case in which it does so amount, this notification will enable arrests, which cannot now be lawfully made, to be lawfully made.

As regards the effect of Yusuf-ud-din's case in 25 Cal, page 20, the Privy Council appears to me to have laid down* the following propositions :—

Cf corres., pages 4-5 in I A, January 1889, Nos 144-157.

(1) The notification itself can give no authority or jurisdiction, and, to use their Lordships' words, " as the stream can rise no higher than its source, that notification can only give authority to the extent to which the Sovereign of the territory has permitted the British Government to make that notification."

(2) The conferring of civil and criminal jurisdiction along the line of a railway running through an independent State, notwithstanding any words in the notification of the Government of India, does not justify an arrest on the railway lands of the State of a subject of a State under the warrant of a Magistrate in British India on a charge of a criminal offence committed in British India and unconnected with the railway administration.

Their Lordships of the Privy Council, after stating the proposition just referred to, observe as follows :—" The only question, therefore, that remains is whether the act complained of in this case was one which can in any sense be regarded as coming within the jurisdiction along the line of railway." Having regard to the facts in Yusuf-ud-din's case, they held that the offence in that case was not connected with the administration of the railway and they therefore held that the arrest of Yusuf-ud-din was illegal. It is possible to hold that upon the facts of the case before them the judgment of their Lordships is unimpeachable. But I am very doubtful whether upon a true view of the law it can be maintained that it is essential for the exercise of this jurisdiction that the offence for which a person is arrested on railway lands must of necessity be one which is connected with the administration of the railway. This was the line of argument which was advanced by Mr. Asquith, who appeared for Yusuf-ud-din in that case. His argument was that this was not a general jurisdiction for the repression of crime in India, but for maintaining order in

connection with railways in independent States. The argument of Mr. Cohen on behalf of the Crown was more general and did not challenge specifically the argument of Mr. Asquith which I have just noticed above. Lord Halsbury appears, however, to have accepted Mr. Asquith's argument as will appear from page 31 of the report.* I do not exclude therefore the possibility of the Privy Council explaining away their remarks which I have just noticed in any case which may go up to them in the future. Until, however, the law is further explained by the Privy Council or in some other way modified, I think the position which should be held to be correct is that indicated by Mr. Graham, namely, that in each case it will be a matter of fact whether the cession amounts to cession of full and exclusive criminal jurisdiction. It is really for the Political Department to consider whether a revision of the arrangements by which such jurisdiction is transferred to the British Government is not possible so as to secure from the Indian States a full and exclusive criminal jurisdiction. Bearing in mind, as I do, the attitude of the Standing Committee of the Princes which I attended in November last, I have considerable doubt as to whether the Princes will agree to the cession of such full and exclusive criminal jurisdiction. It appeared to me then that they were not satisfied with the exercise of any jurisdiction by the British Government on railway lands in their territories. But on this question I do not wish to say anything more.

† I. L. R., Col. series, Vol. XXV, 1898. (Same as the Judgment at pages 3-5 of corres. in I. A., January 1899, Nos. 144-157.

No. 71.

Appointment of a District or a Divisional Judge as a Judge of the High Court in Burma.

(2nd October, 1922.)

(Legislative Department unofficial No. 749 of 1922).

In Burma the District Court and the Divisional Court exercise unlimited original jurisdiction and are competent to hear and decide any suit, whatever be its pecuniary value. Clause (*c*) of section 10 of the Upper Burma Civil Courts Regulation, 1896, provides that—

> " a District Court shall have jurisdiction to hear and determine any suit or original proceeding without restriction as regards value, except proceedings under the Indian Divorce Act, and shall be deemed to be the Court of a District Judge as defined by clause 15 of section 3 of the General Clauses Act, 1897."

By clause (*d*), the Divisional Court has the same jurisdiction as is conferred upon the District Court, *plus* the jurisdiction " to hear and determine any original proceedings under the Indian Divorce Act, and is deemed to be the District Court under that Act for the local area within its jurisdiction ".

2. In the Lower Burma Courts Act, 1900, clauses (*c*) and (*d*) of section 25 are exactly the same as those of the Regulation of 1896 which applies to Upper Burma Civil Courts. In the General Clauses Act, a District Judge is defined as " a Judge of the principal civil court or original jurisdiction, but does not include the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction ". I do not see any reason why, for the purposes of appointment as a Judge of the High Court, a Judge in Burma who is either a District Judge or a Divisional Judge should not be treated as a District Judge within the meaning of section 101 (3), clause (*b*) of the Government of India Act. All that it requires is that a member of the Civil Service of not less than 10 years' standing should have for at least three years served as, or exercised the power of a District Judge before he can be appointed a Judge of the High Court. I believe the words " exercised the powers of " were deliberately used to provide for cases of officers who, while exercising some other kinds of powers, are also invested with the powers of a District Judge. The fact that District Judges or Divisional Judges in Burma do not, in point of fact, hear original civil suits is entirely immaterial for the purposes of appointment under section 101 (3) (*b*). Even in the United Provinces, where we have regular District Judges, I have very seldom seen original civil suits being tried by District Judges. But they usually try suits under section 92 of the Code of Civil Procedure or under the Religious Endowments Act or under the Land Acquisition Act ; and they do a certain amount of miscellaneous work under the Guardians and Wards Act and the Succession Certificate Act. In practice nobody has taken exception to the appointment of such District Judges to the High Courts merely because they have not tried a certain number of original suits.

No. 72.

Removal of certain existing differences between European British subjects and Indians in criminal trials and proceedings.

(2nd October, 1922.)

(Legislative Department unofficial No. 767 of 1922).

There are two questions referred to this Department by Mr. Tonkinson. They are as follows :—

(1) Can the Secretary of State in Council approve of the making of a law by the Indian Legislature which will empower all Sessions Courts to sentence European British subjects to the punishment of death ;

(2) Even if he can so approve, that is to say, legislation in Parliament for this purpose is not necessary, is it a valid argument that such action would be going beyond the intention of the clause and should, therefore, not be taken without a reference to Parliament ?

2. As regards the first question, the answer to it depends upon section 65 (3) of the Government of India Act. That section imposes a restriction or limitation upon the power of the Indian Legislature to make any law empowering any Court, other than a High Court, to sentence to the punishment of death any of His Majesty's subjects born in Europe, or the children of such subjects. That restraint or limitation consists in the previous approval of the Secretary of State in Council. If such previous approval is not obtained, then the Indian Legislature cannot exercise that power. I find nothing in the section to warrant the suggestion that this power cannot be exercised by the Indian Legislature so as to empower all courts or that the section requires that the power to pass sentence of death should be conferred upon certain courts which may be approved by the Secretary of State in Council. Reading that section in a natural way, I do not think that there can be any room for the contention that what was intended was that the power to pass sentence of death on any of His Majesty's subjects born in Europe, or their children, should be conferred only on selected Sessions Judges with the previous approval of the Secretary of State in Council The fact that in the present Act the expression used is " any court " while in section 46 of the Act of 1833 the expression used was in the plural, that is to say, " any courts of justice " does not to my mind at all justify the conclusion that under the present Act only selected courts or courts especially approved by the Secretary of State in Council were intended. The substance of the two sections, that is to say, section 65 of the present Act and section 46 of the Act of 1833 seems to me to be the same. But, even were it not so, I think the language of the present Act is so very plain that there would be no justification for going outside the present Act and tracing its history to an earlier Act. As Lord Herschell said in the case of the Bank of England *versus* Vagliano Brothers, 1891, (Appeal cases at page 44) :—

> " I think the proper course is, in the first instance, to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably

intended to leave it unaltered, to see if the words of the Enactment will bear an interpretation in conformity with this view."

3. The answer to the second question is that, if the Secretary of State in Council gives his approval, he would not be going beyond the intention of the clause. The law itself imposes no obligation on him to make a previous reference to Parliament. It confers on him the right of being previously consulted and of giving or withholding previous approval to any such law, if the Indian Legislature intends to pass it. Whether the Secretary of State in Council will in the present instance consult Parliament or exercise the statutory right which is conferred on him without any such reference is a question of policy and on that question I think the Secretary of State in Council can best decide for himself.

L149LD

No. 73.

The Special Marriage (Amendment) Act, 1923.

(25th October, 1922.)

(Legislative Department, Progs. A. and C.—A., December 1923, Nos. 55-67).

The present position with regard to Hindu marriages may be described as follows : Upon the authority of certain Puranas, inter-marriages between different castes are now absolutely prohibited (see the authorities quoted in support of this proposition in Sir Gurudas Bannerji's Hindu Law of Marriage and Stridhan, at page 71). Formerly inter-marriage between persons of different castes, though not approved, was permitted according to certain texts of Mannu. The sum and substance of these texts is that a woman of any caste was allowed to be married to a man of a higher caste, but her marriage with a man of lower class was discountenanced and the children of such marriage were called low-born.

2. In various cases which have come up before judicial tribunals, the authority of the Puranas has been assailed, and it has been argued that there is nothing in the texts of ancient law-givers amounting to prohibition of inter-marriage between a person of one caste and a person of another caste. Most of these attempts have been repudiated by judges and by none more strongly than by Hindu judges. I understand from newspaper reports that very recently Mr. Justice Shah of Bombay has given a decision upholding marriage between a member of one caste and a person of another caste. I have not, however, had the benefit of reading his decision, and I therefore refrain from expressing any opinion on it. I, myself, argued this point at great length in a case some years ago which was heard by Mr. Justice Bannerji and Mr. Justice Piggot of Allahabad. Mr. Justice Bannerji, the senior Judge, was wholly opposed to the recognition of such marriages in spite of the fact that in that particular case there was the additional feature that a mixed marriage of that kind was recognised according to the law and custom of Nepal to which the parties belonged. Indeed, in respect of the property situate in the territories of Nepal, the son of that mixed marriage had been recognised by the Nepal courts as perfectly legitimate, but with regard to the property situate in British India, the High Court at Allahabad, refused to recognise the legitimacy of the child. The position was extremely unsatisfactory. An appeal was lodged to the Privy Council but I understand that it was not prosecuted for want of funds.

3. That there is a growing feeling in favour of such mixed marriages among the educated classes, there is no room for doubt. As the law stands at present, a marriage between persons of different castes may be celebrated under Act, 3 of 1872 ; but then they must declare that they are neither Hindus nor Mahomedans. This requirement of the law is objected to on conscientious grounds, and it is urged that having regard to the modern conditions of India, a Hindu, though he may not conform to all the orthodox formulae, may with impunity transgress any particular rule or rules of his caste. Indeed the rigour of the caste code has been very much softened down by a decision of the Privy Council reported in 31 Cal. Bose *versus* Rani Sunder Kunwar. That was a case in which it was proved that Sardar Dyal Singh Majithia, a Sikh gentleman of the Punjab, to whom the Hindu law was applied, had ceased to be a Hindu because he freely dined with Europeans and Mahomedans

and had lived a life of open violation of certain orthodox principles and practices. The Privy Council held that the heterodoxy in matters of practice did not put him outside the pale of Hinduism. If a contrary view had been held I should imagine that a large number of Hindus educated on western lines and openly breaking some rules of orthodoxy would be thrown out of the Hindu fold.

4. The legal position with regard to marriage is somewhat different. Marriage according to the Hindu law is not a civil contract but a sacrament. It can be performed only to the accompaniment of certain religious rituals. Much as I should like myself all marriages under the Hindu law to be placed on the footing of civil contracts, I do not think that the time for such a sweeping change has arrived yet. Meanwhile the judicial decisions of the High Courts in India, which have refused to recognise inter-marriages between persons of different castes, have given extreme dissatisfaction to the advanced section of the Hindu community, and it is felt that on broad principles the Legislature should come to the rescue of the dissenting minority and protect it in the exercise of its option. The need for some legislation on the subject is therefore keenly felt. The orthodox community cannot be expected to agree to a Bill of this character, but it seems to me to be obviously unjust and unfair that the freedom of choice of the minority should be sacrificed to the will of the majority. I am for this reason, of opinion that for the benefit of the minority, and subject to the suggestions made below, the Government should not adopt an attitude of opposition or obstruction to this Bill.

5. As the Bill of Dr. Gour stands, marriage between a Hindu and a Mohamedan may be celebrated under the Act. I am of opinion that so long as the scope of the Bill continues to be as wide as it is, there is not the slightest chance of its being accepted either by the Hindus or by the Mohamedans. The Mohamedans will particularly be opposed to it, as according to the Mohamedan law a marriage between a Mohamedan and a Hindu will be perfectly invalid. I therefore think that the scope of the Bill should be expressly limited only to those cases where both parties are Hindus, or Sikhs or Jains (Sikhs and Jains have been held by the courts to be Hindus for purposes of succession, marriage, etc.). At the first meeting of the Select Committee, Dr. Gour conceded this point.

It should be made absolutely clear that the Bill is simply permissive.

A marriage under the Act should be strictly monogamous, that is to say, if a person marries under this Act, he should not be allowed to marry another wife during the lifetime of his first wife.

6. As jointness is the normal condition of the Hindu family, it seems to me that the Bill should provide expressly for the effect of a marriage of a member of a joint Hindu family with a woman of a different caste upon the jointness of the family. Dr. Gour and some other members of the Committee seem to be of opinion that a member of a joint Hindu family who marries a woman of a different caste, should be allowed to continue to live as a member of that family, that is to say, should be allowed to reside in the house and enjoy the rights as coparcener until another member of the family claims separation or division or both. I am of opinion that the more reasonable and logical position would be to provide that such a marriage would *ipso facto* have the result of breaking up the jointness of the family unless the other members of the family

desire, re-union with all the consequences that flow from re-union under the Hindu Law. It seems to me that apparent conformity to certain religious principles (howsoever much they may be broken in actual practice) is one of the leading characteristics of a joint family, and a breach on the part of a member of the law of marriage cannot at all be conducive to the maintenance of harmony among the various members of the joint family. Besides, from the legal point of view, it seems to me that the suggestion that I have made above is likely to provoke less opposition to the Bill than the rule as formulated by Dr. Gour. It will be noticed that all that I am suggesting is that the legal effect of such a marriage will be to bring about separation and as is well known separation in interest under the Hindu law is quite different from partition by metes and bounds.

7. *Succession.*—I am of opinion that so far as secular property is concerned, the law must provide for the inheritance of the husband to the wife and *vice versa* and for lineal succession. The offspring of such mixed issue should not be eligible for collateral succession. It follows that collateral heirs should also be debarred from succeeding to the offspring of such mixed issue. It will be noticed that I am making this suggestion not because I myself have any objection to collateral succession, but because I feel that the suggestion that I have made will probably be more acceptable to the orthodox sentiment. Dr. Gour's suggestion on this point is that there should be collateral succession but that if the person marrying is a member of a joint family and the family to which he belongs does not accept the marriage, he will have no right to succession to the ancestral property unless he is the only surviving member of the family. This, to my mind, will be very unworkable in actual practice, and will also be a fruitful source of litigation. If there be children of the same father by different wives ; for instance, if a Hindu has a son by a wife of his own caste and upon her death marries a woman of another caste and has another son by her, the two sons should inherit to the father equally, though it may be that the son of the first wife, that is to say, of the wife who belonged to the same caste, may also inherit collaterally. Another important point to be considered in this connection is whether upon the separation by a member of a joint Hindu family by reason of his marrying outside his own caste, he and his issue will continue to be a joint family, *qua* the ancestral property, which may have come, to the father upon such separation. I have no strong feeling on this question, but on the whole I am inclined to think that it will be better to provide that the father and his son will continue to constitute, under these circumstances, a joint family. The difficulty however may arise when there is another son by a different wife. In such a case the son by the wife of the same caste may not like to continue to be a joint member. I would give him an option to separate which he undoubtedly possesses under the Law.

8. So far, I have dealt with the question of succession to the property of a male person. We have also to provide for the succession to the property of the female. For instance there is a separate line of heirs under the Hindu law to the Stridhan, and then again there are different heirs to the different kinds of Stridhan. To give a practical illustration, the husband may be a Brahmin and the wife may be a Kshattrya. The wife may own property in her own right. If the wife dies, leaving such property, who will be her heir ? According to the Mitakshara the maiden

daughter takes the first place ; failing her, the married but unprovided or indigent daughter, and in her default, other daughters. In Bombay, the order of succession to Stridhan, according to judicial decision is that after the direct issue comes the husband. After him comes step-son, step-grandson, co-widow, step-daughter, step-daughter's son, husband's mother, husband's father, husband's brother, husband's brother's son, and a pre-deceased son's widow (see Ghose's Hindu Law, page 355). The leading case on the subject of succession to Stridhan now is the Privy Council decision in Bai Kaiser Bai, *versus* Hansraj Morarji (I.L.R. 30, Bom. 431). In that case Their Lordships of the Privy Council observed as follows :—

> " You have the following list of relations to the childless widow and deceased proprietress of the Stridhan, who are said to be her sons and are called by text-writers, secondary sons :—
>
> (*a*) sister's son ;
>
> (*b*) husband's sister's son ;
>
> (*c*) husband's brother's son ;
>
> (*d*) brother's son ;
>
> (*e*) son-in-law or daughter's husband ;
>
> (*f*) husband's younger brother."

9. Their Lordships then went on to say that this order was at variance with the settled and universally recognised principles of the Hindu law of inheritance and that the enumeration was obviously not exhaustive. I have referred to these provisions of the Hindu law in order to show how extremely difficult it would be to provide satisfactory rules for succession to Stridhan. Sir William Vincent suggested that probably we might apply to such cases the provisions of Act X of 1865 (Indian Succession Act). That indeed would be a very serious departure from the Hindu Law but on the ground of simplicity and certainty, I am inclined to agree with that suggestion. It will however have to be put to the Hindu members of the Select Committee. I do not think that their attention was drawn to this question on the last occasion, but I do hope it will be drawn when they meet next. We should also have to provide for succession to property which is not of a secular character. For instance, there may be an hereditary Shebaitship in the family. I would provide that a person who married under the Act would be disqualified from succeeding to any Shebait rights in any case, and that his issue would be equally debarred. This is a very necessary concession to orthodox sentiment. I call that necessary because a higher degree of orthodoxy is expected in the case of succession to religious rights which also impose upon the person succeeding to them certain religious functions and duties.

10. *Adoption.*—I am of opinion that a Hindu marrying under the Act should have the same right of adoption as he would have if he had been married in accordance with the rites and customs of the Hindu religion. Such adopted son should, in my opinion, have no higher or lower legal rights in regard to succession than if he had been the natural son of his parents. While, speaking for myself, I am in strong sympathy with the principle of Dr. Gour's Bill, I cannot help expressing the feeling that the Bill as drafted is very crude and very inadequate and I am afraid that unless Dr. Gour makes radical changes, so as to meet some of the points raised above, he will have very little chance with the Assembly which is remarkably conservative in social matters.

No. 74.

Validation of the retention in the Central Provinces of the Malkharoda Jagir and certain Gaontia villages hitherto treated as part of the Chandarpur-Padampur Estate.

(7th November, 1922.)

(Legislative Department unofficial No. 845 of 1922).

The question raised in this case is by no means free from difficulties.

With the exception of certain areas, the district of Sambalpur was transferred from the Central Provinces to Bengal by a proclamation dated the 1st of September 1905. The excepted area is described in that proclamation as the Chandarpur-Padampur Zamindari and the Phuljar Zamindari. On the 16th of September 1905, it was pointed out by the Chief Commissioner of the Central Provinces that the areas excepted were incorrectly described, with the result that the Malkharoda Jagir and 9 Gaontia villages which should have been retained in the Central Provinces had by the terms of the proclamation passed to Bengal. The Government of India at that time considered it inexpedient to amend the proclamation, though they expressed their willingness to make the notification later on. The question appears to have been raised again by the Bengal Government in 1907, and the Bengal Government and the Central Provinces Government were of opinion that the position should be regularised. The Government of India were, however, again of opinion that it was desirable to postpone the rectification until the interpretation of the proclamation was successfully challenged in a court of law. It appears that the proclamation has been challenged successfully in the court of the Subordinate Judge of Manbhum, Sambalpur, who has held that he has jurisdiction to try a suit relating to this jagir. His decision has been affirmed by the Bihar High Court, who have refrained, however, from discussing any question regarding jurisdiction. It is now proposed to regularise the position.

2. Under section 60 of the Government of India Act, the Governor General in Council has the power to alter the boundaries of any of the provinces and distribute the territories of British India among the several provinces, subject to the two conditions laid down in the section. The tract in question appears to be by no means large in area. It is certainly not an entire district which could only be transferred from one province to another with the previous sanction of the Crown signified by the Secretary of State in Council. I see no reason why Government could not take action under section 60, if it is considered desirable to transfer this area from the jurisdiction of the Bihar Government to which it ultimately came in 1912 to the Central Provinces Government. Section 61 of the Act provides that " any alteration in pursuance of the foregoing provisions of the mode of administration of any part of British India or of the boundaries of any part of British India shall not affect the law for the time being in force in that part." Now, the law which is in force there is, as pointed out by Mr. Wright, the law in force in Bengal. I agree with him that the notification must be supplemented by legislation which should make it clear that the area is no longer

included in the district of Sambalpur for the purposes of the Bengal, Bihar and Orissa and Assam Laws Act, 1912.

I also agree that it would be necessary to legislate for taking this area out of the jurisdiction of the Bihar High Court. Section 109 (1) would not obviously apply to a case like this as there is no High Court in the Central Provinces.

3. The real difficulty in the case will be with regard to the validation of proceedings, legal and administrative, which have taken place during the last 17 years. Mr. Casson suggests an Indemnity Act, protecting the Central Provinces authorities and officers against any actions in respect of their official acts done in this area, and an Act prohibiting the civil and criminal Courts from entertaining any suit, claim, appeal or application to re-open any cases tried by, or reverse, annul or amend or declare invalid anything done by the Courts *de facto* exercising jurisdiction in this area on the mere ground that they had no legal jurisdiction therein. In point of fact it appears that in spite of the interpretation which has now been judicially put on the proclamation of 1905, the administration continued in the hands of the Central Provinces Government. Similarly, he points out difficulties with regard to the collection of revenue which has been made by the Central Provinces authorities during this period. He thinks that suits would not lie against the Secretary of State merely because the monies legally due to him were collected by the wrong people. I myself think that it is in the highest degree improbable that any such suit will be filed against the Secretary of State. The only difficulty that I find in accepting Mr. Casson's suggestion with regard to the Indemnity Bill is that in case that Indemnity Act is attacked in a court of law, it would be extremely difficult for the Government to plead that the mistake which had arisen in 1905 was a *bona fide* mistake, that is to say, a mistake of which they were not cognisant until the judicial decision was given by the Subordinate Judge. The whole record shows that within a few days of that proclamation the attention of the Government was drawn to the mistake, and for some reason or other they declined at that time and again in 1908 to regularise the position. In any case having regard to the smallness of the area, I think we might take the risk of legislating on the lines suggested and refrain from moving the parliamentary machinery.

No. 75.

(I-II.)

The Legal Profession, its present position and future constitution. Question of the creation of an independent Indian Bar.

I.

(18th November, 1922.)

(Legislative Department Progs. A., November 1923, Nos. 83-100-A.C.)

I do not propose in the present note to trace the beginning of the legal profession since the establishment of British rule in India. I shall only refer to the well known historical fact that during the days of the East India Company, there were two classes of final Courts in India, the Supreme Courts which exercised jurisdiction within the Presidency towns of Calcutta, Bombay and Madras and over European British subjects outside in certain respects and the Sudder Dewany Adaulat, which was the final Court of Appeal in civil matters and the Sudder Nizamaut Adaulat, which was the final Court of Appeal in criminal matters. The Members of the English Bar usually attached themselves to the Supreme Courts; the vakils or pleaders, on the other hand, could only practise in the Company's Courts that is to say, the Sudder Dewany Adaulat and the Sudder Nizamaut Adaulat. It was, however, open to the Members of the English Bar to appear in the Sudder Dewany Adaulat and the Sudder Nizamat Adaulat Courts, and I have come across names of counsel in cases disposed of by those Courts.

2. In the presidency towns since the earliest days there has been the dual system of counsel and solicitor. That was probably due to the fact that the presidency towns contained a larger English population and were governed by the English Common Law and equity, excepting where the Common Law was modified by Acts of the Governor General in Council or later on by the Legislature. In the mofussil, however, as also in the case of the Sudder Dewany Adaulat and the Sudder Nizamaut Adaulat, vakils or pleaders were never required to be instructed by solicitors and they combined in themselves the functions both of counsel and solicitor.

3. In the sixties of the last century, the High Courts were established and they replaced the Supreme Courts and combined in themselves in Calcutta, Madras and Bombay the jurisdiction which was exercised formerly by the Supreme Court and also by the Sudder Dewany Adaulat and the Sudder Nizamaut Adaulat. In the case of Allahabad, the jurisdiction conferred upon the Allahabad High Court was purely appellate and it replaced the Sudder Dewany Adaulat and the Sudder Nizamaut Adaulat.

4. Section 9 of the Letters Patent of the Calcuta High Court may be taken as the typical section and that section relates to the admission of Advocates, Vakils and Attorneys. It runs as follows :—

> " And we do hereby authorise and empower the said High Court of Judicature at Fort William in Bengal to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court shall seem meet ; such Advocates, Vakils and Attorneys shall be and are hereby authorised to appear for the suitors of the said High Court, and to plead or to act, or to

plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions."

The same provisions are to be found in the case of the Bombay, Madras and Allahabad High Courts. I shall here quote paragraph 11 from the Despatch of Sir Charles Wood, Secretary of State, dated the 14th of May, 1862, which accompanied the Letters Patent. Paragraph 11 runs as follows :—

"In regard to admission of Advocates, Vakils and Attorneys, the recommendations of the Law Commissioners have been followed. Under the existing practice, the Advocate pleads, and the Attorney acts, for the suitors of the Supreme Court, and the Vakil both pleads and acts for the suitors of the Sudder Court, of which the Advocate and Attorney of the Supreme Court are *ex-officio* Vakils. And these terms are employed in the Charter simply to express the functions of these several classes of practitioners. The Advocate and Attorney will respectively plead and act in the High Court and the Vakil will both plead and act in the High Court as he did in the Sudder Court. Any persons may apply to be admitted either as an Advocate or Vakil or Attorney under the rules which the Court is authorised by the Charter to make, *and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakils of the High Court, should the Judges consider such a course to be expedient.*"

I lay some stress upon the words which I have italicised above. According to the practice in the towns, Calcutta, Madras and Bombay, Advocates receive instructions from Attorneys.* According to the practice prevailing in Allahabad, Advocates, like Vakils, receive instructions directly from clients. The same is true of the Lahore High Court. In the case of the Patna High Court too, Advocates can receive instructions directly from clients, though, I understand, that senior counsel there generally prefer to be instructed by pleaders.

(*a*) In Calcutta, the original side is open only to Advocates, that is to say, Members of the English Bar.

(*b*) In Bombay, on the original side Advocates who are Members of the English Bar or Advocates who hold that position by reason of their having passed a certain examination held by the Bombay High Court, or Vakils of the High Court of not less than 10 years' standing enrolled as Advocates at the discretion of the Chief Justice and the Judges are allowed to appear on the original side. Pleaders are excluded.

(*c*) In Madras, both Advocates and Vakils are allowed to appear on the original side.

(*d*) In regard to the appellate High Courts at Allahabad, Patna and Lahore, in the matter of appearance on any side of the Court, there is absolutely no distinction. They have got extraordinary original jurisdiction.

*This applies only to practice in the High Courts. Before the Presidency Magistrate in Bombay, Counsel can appear on instructions directly from clients. I believe the same is true of Madras and Calcutta.

5. (1) The present differences between Advocates and Vakils and Pleaders may be stated as follows. A Member of the English Bar who is admitted as an Advocate of a High Court or any other Advocate takes precedence over a Vakil howsoever senior he may be. I read the other day in certain newspapers that the Calcutta High Court has very recently done away with this privilege of pre-audience which has been enjoyed by the Barristers on its Appellate side. How far the newspaper reports are correct, I cannot say.

(2) Vakils are required to the powers of attorney or *vakalatnamas*, which define their power to represent their clients. Barristers or Advocates are not required to file any such *vakalatnamas*. This privilege, however, is enjoyed only by Advocates of Chartered High Courts. Advocates who are not Members of the English Bar and who practise in the Judicial Commissioner's Court at Lucknow have got to file *vakalatnamas*. I believe the same is true of the Central Provinces and Sind.

(3) Members of the English Bar who are enrolled as Advocates are not according to certain rulings, where the Indian Courts have followed the English Law, liable to suit for negligence ; Vakils are. It has been held in some Courts in India that as in England, so in India, a Barrister cannot sue for his fee, but a Vakil may.

(4) In regard to certain appointments, Members of the English Bar have got statutory protection. Vakils do not enjoy the same privileges. For instance, under section 101 (4) of the Government of India Act, "Not less than one-third of the Judges of the High Courts, including the Chief Justice but excluding Additional Judges, must be Barristers or Advocates who are Members of the Faculty of Advocates in Scotland of not less than 5 years' standing." There is no minimum provided for pleaders. A pleader may be appointed a Judge of the High Court, but he must have been a pleader of not less than 10 years' standing.

(5) Last year a reference was made to me as to whether upon a true interpretation of section 101 (4) a Vakil could be a Chief Justice. I was inclined to the opinion that he could be, and I know that this is the interpretation which has been put upon it by some other lawyers, including Sir Ashutosh Mukherjee of Calcutta. The Secretary of State, however, made a reference to the Law Officers of the Crown and my recollection is that while the Law Officers of the Crown did not exclude the possibility of my interpretation, they thought that having regard to the usage and convention, the safer course was to amend the Act if it was desired to throw open the appointment of Chief Justice to Vakils.

6. In the year 1879 the Indian Legislature passed an Act called the Legal Practitioners Act, 1879, which applies to Bengal, United Provinces, Punjab, Oudh, Central Provinces, and Assam and has been extended to Madras. Bombay passed a separate Act of its own in the year 1920 which is Act No. XVII of 1920. The Legal Practitioners Act of 1879 deals with the following class of legal practitioners in India.

7. Advocates, Vakils, Attorneys, Pleaders, Mukhtars and Revenue Agents.

It will be noticed that under section 13 the High Court has got the power to suspend or dismiss any Pleader or Mukhtar for professional mis-

conduct or for certain other reasons which are specified in that section. That section does not apply to Vakils or Advocates. Here it may be necessary to point out that ordinarily speaking a Pleader is a lawyer who is entitled to practise in the subordinate Court, but not in the High Court, whereas a Vakil or an Advocate can practise in any Court. On the other hand, the word " Pleader " in Bombay is used in the same sense in which the word Vakil is used elsewhere. The power of suspension, so far as Pleaders or Mukhtars is concerned, is also given to District Judges. So far as Vakils and Advocates are concerned they are dealt with under section 10 of the Letters Patent of the Calcutta, Bombay and Madras High Courts and by a similar section in the Letters Patent of the other High Courts. Power is given by section 6 of the Legal Practitioners Act to make rules as to the qualifications, admissions and certificates of proper persons to be Pleaders of the subordinate Court. Similarly, power is given by section 10 of the Letters Patent to make rules for the qualifications and admissions of proper persons to be Advocates, Vakils and Attorneys of Law of the said High Court. Section 31 of the Bombay Act, which I have referred to above, also confers upon the Bombay High Court the power to prescribe the qualifications and the mode of admissions of Pleaders who again are divided into Vakils of the High Court and District Pleaders, *vide* section 3.

8. At the outset I may say that I do not at all wish to exclude members of the English Bar from enrolment in the various High Courts in India or practice in any Court in India although in some of the Colonies a member of the English Bar is not admitted unless he first passes a preliminary examination in the local laws. My definite proposals are as follows. Separate statutory bodies should be established in each province with powers :—

(1) to give calls to the Bar,

(2) to admit Pleaders and Solicitors where Solicitors usually practise,

(3) to regulate legal education and hold examinations,

(4) to prescribe rules and regulations relating to professional morality and etiquette,

(5) to act as referees in matters of professional etiquette and conduct,

(6) to exercise disciplinary power over professional delinquents.

9. I would compose such bodies as follows :—

(1) The Chief Justice of each High Court to be President.

(2) One Judge who is a member of the English Bar.

(3) One Judge who is a Vakil Judge.

(4) The Advocate General or the Government Advocate.

(5) The Government Solicitor (where necessary).

(6) The Government Pleader.

(7) Three members of the English Bar who may have been practising as Advocates in a High Court for a period of 15 years.

(8) Three Vakils or Advocates who may have similarly practised for 15 years.

The last two classes in my opinion should be elected by the Central Bar Association attached to each High Court. In course of time No. (7) will disappear, but it will not be I think for a whole generation or more.

10. This would no doubt entail considerable modification and it may involve the repeal of the Legal Practitioners Act and the Bombay Act. It will also involve a considerable modification of the Letters Patent of the various High Courts.

11. As regards legal education and examinations it may be pointed out that the present arrangement in India is as follows. The Universities of Calcutta, Madras, Bombay, Allahabad, Lahore and Patna give legal education and hold examinations. In some places the course of study extends over two years, in others over three years. Successful candidates at the law examination are in some places required to pass a practical test which is held by the Judges, for instance, in Calcutta, or are required to be articled to some senior Vakil as in Madras, or to practise for two years in a subordinate Court as at Allahabad before they are allowed to practise in the High Court. I contemplate a stage being reached at which it should be possible for these statutory bodies to organise legal education and to hold their examinations independently. But I realise that there may be financial and other difficulties in the beginning, but until that stage is reached these bodies should be brought into touch with the Universities so that their views may be represented on the Faculties of Law of each University and they may have a substantial voice in the regulation of legal education and examinations.

12. I do not propose to disturb the present arrangement in Calcutta, Bombay and Madras under which Counsel receive instructions from Solicitors. If they see any advantage in that, I do not think we need interfere with their arrangement, but I would not impose Solicitors on provinces where no Solicitors exist at the present moment, for instance, Allahabad, Patna, and Lahore. There, counsel and Vakils have always dealt with clients directly, and I do not think that the professional morality of the legal practitioners of these places can be said to be worse than the professional morality of legal practitioners in Calcutta, Madras and Bombay.

13. Under my scheme those who will be called to the Bar by such bodies will have exactly the same status and position and the same rights in regard to appointments and other professional privileges as members of the English Bar. I am prepared—and indeed I think it necessary—to say that in the event of this proposal being accepted the rules of professional morality which govern the members of the English Bar in England should be made applicable to the members of the provincial Bars which shall thus be created.

14. I would make the decisions of these statutory bodies in regard to professional matters final, excepting perhaps on certain substantial questions of law on which there may be an appeal to the High Court upon a certificate given by the statutory body concerned.

15. A very large number of Indian students at present go to England to be called to the Bar. They concentrate in London and being away from

their home influences and with no one to guide or control them not a few of them go wrong. I do not deny for a moment that we have had some very eminent lawyers among Indian Barristers in presidency-towns. As against them, however, must be set off the large number of failures in other High Courts and the mofussil towns. I may say that some of my predecessors and some Indian members of the English Bar have laid great stress on the advantages of residence in England for three years and the association with great legal minds there. With all respect to them, I am bound to point out that either this view is exaggerated or it does not take notice of the actual instances of failures which are neither few nor negligible in all parts of India. An average Indian youth has no access to good society in England and the instances of men who have really benefited by legal education there can be counted on one's fingers' ends. In my opinion, experience has shown that not a few of the men who have done well there and done well also on their return to India were men who had passed the Vakil's examination in India and then gone to be called to the Bar.

16. As regards legal education I maintain, and maintain very strongly, that the standard of legal education in India is by no means less high than the standard in England. I admit that there is room for improvement. It is a great mistake to suppose as urged by Sir Ali Imam in one of his notes that the Indian students in India are fed upon mere Acts of the Legislature. I have been directly in touch with legal education and at one time in my life I was a Reader in Law in the Law College at Allahabad. I used to be an Examiner in some branches of the law until three years ago. I can say that the subjects which are usually taught to our Indian students are as follows :—

(1) Roman Law,
(2) Jurisprudence,
(3) Criminal Law and Criminal Procedure,
(4) the law relating to property, including mortgages, leases, gifts, perpetuity,
(5) Constitutional Law,
(6) Hindu Law,
(7) Muhammadan Law,
(8) Civil Procedure and pleadings,
(9) Evidence,
(10) Limitation, and
(11) in some places, international law,
(12) Law of contract,
(13) Law of Torts,
(14) Equity,
(15) Revenue Law and the law relating to land tenures.

17. I believe that with more interest taken by a statutory body such as I have proposed above, the quality of legal education can still further be improved.

The real difficulty of legal education in India is that there is no legal atmosphere provided for our students and they seldom come into touch

with the leaders of the profession. I think the principal business of this body, which I have suggested, should be to provide this atmosphere, so that our young men may imbibe the highest traditions of the profession and may build up their moral and intellectual strength.

18. I believe Lord Haldane is a strong supporter of an Indian Bar, I know there are other Judges too, for instance, Mr. Justice Bucknill of Patna, and Mr. Justice Walsh of Allahabad, who hold more or less similar views. The real opposition to this scheme comes from the Indian Members of the English Bar, and much as I should like to avoid making any uncharitable suggestion, I feel myself compelled to say that their opposition is not wholly disinterested. They have hitherto enjoyed a monopoly of practice on the original side at each High Court except Madras and they have claimed and they have maintained a position of superiority over the other branches of the profession. I cannot for a moment accept that it should be impossible for vakils or Advocates wholly trained in India to understand and adapt themselves to the practice and procedure that prevails on the original side. It is to my mind absurd to suggest that Indian Vakils practising in the High Court cannot understand English rulings or English law. The mention of men like Sir Rash Behari Ghose, Sir Ashutosh Mukerjee in Calcutta, Sir Bashyam Ayyangar and Sir Subramania Ayyar in Madras, Mr. Justice Ranade and Mr. Justice Telang in Bombay, Sir Sunder Lal, Pandit Moti Lal Nehru and the late Dr. S. C. Banerji in Allahabad, should, in my opinion, be an effective answer to all this ill-informed criticism. The Vakils have written some of the finest books on legal subjects, and it is to their credit that some of their books have been referred to with appreciation by English and American writers. At a time when Indians themselves are putting forward the claim for the Indianisation of services, it seems to me to be unthinkable that Indians should refuse to have an organisation for an independent profession like Law in India. I do not stand committed to Mr. Rangachari's Bill in all its details, but I maintain that the principle for which he is fighting is wholly sound, and, as far as I can foresee, there is every chance of a Bill of that character being passed by this Assembly. It is for this reason that I consider it necessary that the Government themselves should take a broad and statesmanlike view of the whole question, and instead of leaving the initiative in other hands, should take the initiative themselves. I have not in the preceding remarks referred to the lowest grades of legal practitioners in India, *viz.*, Mukhtars and Revenue Agents. That is a very small matter and it can be dealt with separately. I have in this note attempted to show that excepting Solicitors, there should be two classes of practitioners in India, (1) Advocates, who shall in all respects be the same as the Members of the English Bar, who are enrolled as Advocates in India, and (2) Pleaders, who shall be allowed to practise only in the Subordinate Courts and whose position will more or less correspond to that of solicitors practising in County Courts in England. It is not my purpose and it is not my intention that I should exclude the English Barrister from practising in India. No one attaches more value than I do to the English Barrister of the right type. I cannot, however, reconcile myself to a state of things which in actual practice imposes a sort of brand of inferiority upon a class of professional men, who have everywhere in the profession established their claim to equal treatment and equal privileges. It is true that there are black sheep among pleaders. But I have known black sheep

among Barristers too everywhere in India. Nor do I intend to disturb the arrangements that may be prevailing in any particular Court, with regard to the division of the duties of Advocates and Solicitors. The question will probably require to be examined very carefully by a Committee on which representatives of the various branches of the legal profession from all parts of India and Judges may be appointed, but I do sincerely hope that the prejudices of any branch of the profession will not be allowed to prevail against a constructive policy for the future.

II.

(6th December 1922.)

History of the Legal Profession in India.

Whether there was a profession of lawyers in India in Hindu times is to my mind a question not free from doubt. There are undoubtedly very specific provisions laid down with regard to the trial of suits in ancient Hindu law ; the duties of the judges and the assessors are also prescribed ; the mode of examination of witnesses is laid down ; but I confess that in spite of details of this character in ancient sacred books I have not been able to come across any passage from which a clear inference as to the existence of the legal profession and the duties and rights of the members of that profession can be drawn. In his judgment in the case of Ragina Guha, (I. L. R. 44 Cal. 290,) Mr. Justice Mukherji makes the following observations :—

> " As regards Hindu Courts, it is clear that the legal profession existed in the seventh century of the Christian era, when Asahaya wrote his commentary on the Institutes of Narada. To the same effect are texts of Vrihaspati Katyayana and Vyasa quoted by Raghunandan in his Vyabahara Tatwa. It is also fairly clear from Buddhistic books that the profession of lawyers existed in the first century before the Christian era ; they were known as " sellers of law " or " traders of law " who " explained and re-explained, argued and re-argued " (Milinda Panho Book V.-23 ; Trenckner's Edition, pages 344-45 ; translation by Rhys Davids, Sacred Books of the East, Vol. XXXVI, pages 236-238). There are also references to pleaders in the Dhammathats or the Laws of Menoo (Richardson's Law of Menoox, page 50). Similarly, the Sukaraniti (IV, 5, 10, 13, 26, 80—82) mentions pleaders."

I have myself examined the texts of Narada and the Buddhistic books to which reference is made by Mr. Justice Mukherji ; but with all respect to him, I regret that I cannot draw the same inference as he has drawn from those texts. All that I can say from those texts is that there was a certain class of men who expounded the law, but whether their position corresponded to Roman jurisconsults or to the present-day pleaders who appear in courts of law on behalf of clients and conduct and argue their cases is not so clear to me. I am inclined to think that whatever other functions those persons might have discharged they did not form a pro-

fession in the modern sense of the term.* As regards courts in Muhammadan times in India, Mr. Justice Mukherji himself says that he has not been able to obtain any information ; nor have I been able to find any definite information on the subject.

2. The question as to whether at one time in remote history or in Muhammadan times the legal profession in its modern sense existed does not appear to me to be very material for the purposes of this note. We may therefore trace its beginning from the early days of British rule.

British Period.

In the second edition of Harrington's Laws and Regulations which was printed so far back as 1821, there is a good deal of material to be found about vakils or native pleaders. The complete history of the circumstances in which the East India Company brought into existence vakils or native pleaders is given at pages 148-161. It appears that the first regulation which was passed was Regulation 7 of 1793 ; it set forth at length " the general disqualifications of the persons before employed, occasionally or professionally as pleaders ; who by their ignorance of the laws and regulations, and imperfect knowledge of judicial proceedings, as well as from their being liable to collusion and intrigue with the ministerial officers of the courts, impeded and prevented, instead of aiding and promoting the speedy and impartial administration of justice..... It was, therefore, indispensably necessary that the pleading of causes should be made a distinct profession ; that none but persons duly qualified should be admitted to plead in the courts of judicature ; and that with a view to induce men of education and character to undertake the office of pleader, to prevent their being deterred from pleading the causes of their clients with becoming freedom, and to ensure integrity and fidelity in the execution of their duties, their appointments should be secured to them as long as they conform to the regulations prescribed for their guidance ; and they should be entitled to receive a fixed and liberal compensation, proportionate to the amount or value of the cause of action in the suits wherein they might be employed." Harrington then refers to section 2 of Regulation 15 of 1795, section 4 of Regulation 21 of 1803, Regulation 13 of 1795, Regulation 8 of 1796, sections 4 and 5 of Regulation 8 of 1797, sections 9 to 15 of Regulation 5 of 1798, sections 3 and 4 of Regulation 3 of 1802, Regulation 10 of 1803, and the third clause of section 6 of Regulation 13 of 1808. All these were rescinded by section 2 of Regulation 27 of 1814, " for reducing into one Regulation, with amendments and modifications the several rules which have been passed regarding the office of vakil or native pleader in the Courts of Civil Judicature."

The preamble of Regulation 7 of 1793 is far too long to be quoted here, but it is a statement of an exceedingly interesting character. By section 2 of this Regulation the Sudder Dewanny Adawlut was empowered to appoint from time to time such a number of pleaders of the Muhammadan

*There are, however, some stray passages in the Sukaraniti from which inferences may be drawn as to the engagement of ' pleaders ' in law suits. See Sukaranıti, Chapter IV, Section V, 216-218 to 230. These pleaders were paid fees at prescribed rates. See the footnote at page 193 of Sarkar's edition of Sukaraniti who explains the theory of the appointment of pleaders.

or Hindu persuasion as appeared to them necessary, to plead the causes of parties in suits in the Sudder Dewanny Adawlut, the Provincial Courts of Appeal and the courts of Dewanny Adawlut in the several Zillahs, and the cities of Patna, Dacca and Murshidabad. There was a form of oath prescribed by section 4 which still survives in the rules of the various High Courts in the case of vakils Section 5 provided that the pleaders were to be selected from amongst such students in the Muhammadan College at Calcutta and the Hindu College as might be qualified and be desirous of being admitted to plead in any of the courts. If the Colleges could not furnish a sufficient number of pleaders, the Sudder Dewanny Adawlut was to admit any other persons, provided they were Muhammadans or Hindus, previously, however, ascertaining that they were men of good character and liberal education and giving preference in all cases to persons of this description who had been bred to the study of Hindu or Muhammadan law. It is interesting to note that by section 7 a pleader agreeing to undertake the prosecution or defence of a suit was to get the sum of four annas as a retainer, which was to preclude him from being employed in the same cause against the person so retaining him. Section 10 provided that the fees of the pleaders were to be payable upon a decision being passed in the case, whether upon an investigation of its merits or otherwise, and not before. Indeed, it appears that the fees used to be deposited by the clients for their pleaders in the court. Disrespect to the court on the part of a pleader was punishable with a fine not exceeding Rs. 100, and section 17 provided that pleaders convicted of promoting and encouraging litigious suits, or of frauds, or of gross misbehaviour although not relating to any cause in which they may be concerned, were to be suspended. The Court which suspended a pleader was required to make a report to the Sudder Dewanny Adawlut, which could fine the pleader or dismiss him from office or allow him to resume his practice. There is provision also in the Regulation for the appointment of pleaders for the Government. Section 31 of the Regulation made the pleaders liable to prosecution on the part of their clients for any breach of the Regulation and any fraudulent or bad practices regarding the suit, while section 32 made them liable to certain punishments for unjustified absence from court on the day on which their causes were heard. A pleader so absenting himself was liable to pay a fine of Rs. 50 for the first offence, Rs. 100 for the second offence ; and for the third offence he was liable to be dismissed. These, in short, are the leading provisions of that regulation.

Passing over the intervening Regulations, which were more or less of an amending character, we come next to Regulation 27 of 1814 which was more or less in the nature of a consolidating Act. By section 3 of this Regulation the Sudder Dewanny Adwalut and the several provincial courts were empowered to appoint to the office of vakil in their respective courts such a number of persons being natives of India and duly qualified for the situation as may from time to time appear to them to be necessary. The vakils were bound to be ' Hindus or Muhammadans and the courts were required to give preference to candidates who may have been educated in any of the Muhammadan or Hindu Colleges established or supported by Government,' provided that such candidates were in other respects duly qualified for the situation. Pleaders were liable, by section 6, to dismissal from their office whenever they were guilty of encouraging or promoting litigious suits, of wilfully delaying the suits of their clients for

their own advantage, or refusing or omitting, without sufficient cause to be shown to the court, to carry on the suits of their clients after having accepted a *vakalatnama,* of demanding or accepting from their clients any fee or sum of money, goods, effects or other valuable consideration beyond the fees which they were authorised to receive under the Regulation ; or of fraudulent practices, neglect, or other misconduct in the discharge of their professional duty ; or of gross profligacy or misbehaviour in their private conduct. By section 16 vakils were not allowed to plead in courts other than those to which they were attached by the judges of the Sudder Dewanny Adwalut and provincial courts, and by section 17 the authorised pleaders of the Zillah and city courts were prohibited without obtaining the previous sanction of the judges of those courts from officiating as agents or as mukhtars in any prosecution or trial or proceeding before the magistrates or their assistants. The previous rule with regard to the retainer of four annas was abolished by section 21. Section 35 however still retained the fee of four annas for miscellaneous petitions and motions, but this was not to be deposited in the court. The rest of the provisions do not seem to call for any notice.

This Regulation was amended by Act I of 1846 which made three great changes. The first change was that the office of pleader in the courts of the East India Company was thrown " open to all persons of whatever nation or religion, provided that no person shall be admitted a pleader in any of those courts unless he have obtained a Certificate in such manner as shall be directed by the Sudder Courts, that he is of good character and duly qualified for the Office, any Law or Regulation to the contrary notwithstanding." The second change was effected by section 5 which runs as follows :—

> " Provided, nevertheless, and it is hereby enacted, that every Barrister of any of Her Majesty's Courts of Justice in India, shall be entitled as such to plead in any of the Sudder Courts of the East India Company, subject however to all the rules in force in the said Sudder Courts applicable to Pleaders whether relating to the language in which the Court is to be addressed or to any other matter."

The third change was effected by section 7 which provided that parties employing authorised pleaders were at liberty to settle with them by private agreement the remuneration to be paid for their professional services and that it was not necessary to specify such agreement in the *vakalatnama,* though the taxable fee was to be assessed in accordance with certain regulations.

We now come to the Act of 1865 which is known as the Pleaders, Mookhtars and Revenue Agents Act, 1865, and which was passed by the Governor General of India in Council. The word " Pleader " in this Act included vakils. By section 4 of this Act the High Court was authorised and required within six months after this Act coming into force to make rules for the qualification, admission, and enrolment of proper persons to be pleaders and mookhtars of the courts in such territories, for the fees to be paid for the examination, admission and enrolment of such persons, and subject to the provisions hereinafter contained for the suspension and dismissal of the pleaders and mookhtars so admitted and enrolled. The

power of appointing examiners was vested with the Local Government, but the certificates were to be issued by the High Court. By section 11 pleaders were permitted to plead and act in any criminal court or before any Board of Revenue or in any revenue office within the limits of the general jurisdiction of the High Court in which they were enrolled. As regards mookhtars it was provided that they were authorised to practise, appear and act in any civil court and to appear, plead and act in any criminal court within the jurisdiction of the High Court. Section 12 also removed one other bar and authorised a pleader or mookhtar, subject to the conditions of the certificate as to the class of courts in which he was authorised to practise, to practise in any subordinate court. Section 14 gave the High Court power to suspend or dismiss any pleader who was convicted of any criminal offence. Section 15 gave the High Court power to suspend or dismiss any pleader who was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty or for any other reasonable cause. Section 16 provided the procedure which was to be observed when a charge of unprofessional conduct was brought in a subordinate court. I do not notice the provisions in this Act relating to revenue agents. Section 37 gave the High Court power to fix and regulate the fees which are to be payable upon all proceedings in court by any party in respect of the fees for his adversary's pleader, and section 39 gave parties liberty to settle with their pleaders by private agreement and the remuneration to be paid for their professional services. Such agreement was not to be specified in the *vakalatnamas*. Section 45 was the important section and dealt with advocates and vakils enrolled in a High Court appearing in any court other than a High Court in which they were not enrolled. The proviso of it may be quoted :—

> " Provided that no such vakil shall be entitled to practise under this section before a Judge of the High Court, Division Court or High Court exercising original jurisdiction."

The Act came into force first of all in Bengal and the North-Western Provinces, which at that time corresponded to the province of Agra.

This Act was superseded by the Act which is now in force and which was passed in the year 1879. It is called the Legal Practitioners Act, 1879. I have dealt with the leading provisions of this Act in my original note, and it is not necessary for me to recapitulate its provisions. I have read the Legislative Proceedings relating to this Act, and I find that even at that time one distinguished Indian pleader, Mr. Nanabhai Haridas, who subsequently became a Judge of the Bombay High Court, raised the question whether it was really necessary any longer to restrict the ordinary practice of the High Court Vakils to the Appellate Side of the High Court. I shall quote his own language. Said Mr. Nanabhai Haridas :—

" It does not seem to me that there is any such necessity. Circumstances have considerably altered since 1862, when the High Courts were founded. Law schools have been opened by Government, at great cost, in the Presidency towns, for imparting a regular training in law to native students. Competent professors are appointed who teach English and Indian law, and the universities of Calcutta, Madras and Bombay annually grant degrees in law to such students as succeed in passing very strict examinations ; and candidates for the office of High Court pleaders other than University law graduates, are required by our rules to pass even

stricter examinations. A comparison of the subjects in which these different examinations are held with those in which the examinations of the Inns of Court are held for a call to the Bar in England will show that, as regards intellectual requirements, those who pass the former cannot be in any way inferior to those who pass the latter. Besides, the Indian law, which is the law administered in at least 90 cases out of 100 tried on the Original Side of the High Court can be learned much better in India than in England on account of the numerous facilities existing here. Such being the case, the justice or expediency of continuing by legislation the exclusion of the vakils from practice on the original side of the High Court may well be questioned ; and in this view I would recommend the omission of the proviso to section 4 altogether."

Mr. Nanabhai Haridas then refers to the anomaly that a High Court pleader may sit as a Judge on the Original Side of the High Court, which I understand is the practice in Madras and Bombay though not in Calcutta, but not conduct a suit before the Original Side of the High Court. I also gather from the note that two High Court Judges and Members of Council of Bombay were of the same opinion and so far as the Madras Judges were concerned they expressed their opinion to the same effect as Mr. Nanabhai Haridas in 1866, and they maintained that the experiment of admitting vakils to the Original Side of the Madras High Court had completely succeeded.

It is true that the standard of examination in England has in recent years been also raised, but I am bound to add that in India the standard is even higher to-day than it was in the year 1879, when Mr. Nanabhai Haridas wrote his memorandum.

No. 76.

Note on the desirability of appointing a Judicature Commission.

(6th December, 1922.)

(Legislative Department Pros. A., November 1923, Nos. 83—100-A.G.)

During the last two months His Excellency has on more than one occasion spoken to me about the delays which take place in the disposal of civil suits in India and about the possibility of our overhauling the judicial and legal system so as to secure simplicity of procedure and expedition of work. In August last I submitted a note to His Excellency dealing with the question of delays. As directed by His Excellency I now propose to make a further examination of the whole subject.

2. I shall first deal with the constitution of our courts. At the outset I think it is necessary to point out what exactly a civil court in India means. Briefly put, a civil court may be defined as a court which entertains suits of a civil nature. The Code of Civil Procedure now in force lays down certain rules with regard to the jurisdiction of civil courts. Section 9 of the Code runs as follows :—

"The Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such a right may depend entirely on the decision of questions as to religious rites or ceremonies."

The cognizance of certain class of suits, though of a civil nature, is expressly or impliedly barred and such suits are not entertainable at all by civil courts. For instance, in certain parts of India suits relating to agricultural rent are not filed in civil courts, other class of suits for which express provision made in the Rents Act or the Revenue Acts of the province are also excluded from their jurisdiction. Here, again, it must be pointed out that the Rent Act and the Revenue Act themselves in some provinces provide for certain class of issues being settled by civil courts. To illustrate this, if an application for partition of a Zamindari property is made to a Revenue Court in the United Provinces and a question of title is raised, which the revenue court considers to raise a difficult question of title and does not feel disposed to try it, it may refer the parties to a civil court. Again, there are special enactments providing for the disposal of special class of cases by certain special officers. For instance, in certain parts of India suits relating to agriculturalists are not triable in an ordinary civil court. In Deccan, the Deccan Agriculturalist Relief Act provides for special courts for the trial of certain matters affecting agriculturalists. In the United Provinces, there is a special Act, called the Bundelkhand Encumbered Estates Act which provides special machinery for the settlement of claims against agricultural debtors in that part of the province. I believe, similar instances could be quoted from other parts of India. All such suits would be beyond the cognizance of ordinary civil courts. Confining ourselves, therefore to suits which are not barred out either by an express enactment or by implication from the jurisdiction of the ordinary civil courts, the variety of suits which go

to the ordinary civil courts in this country is bewildering. I shall illustrate this from my own experience of the province with which I am most familiar. In the United Provinces, a very large number of suits relate to the law of mortgages. Some of them relate to the sale of the property mortgaged ; others to foreclosure, and not a few to redemption of mortgages. There is also a very large class of suits relating to pre-emption of zamindari property. Indeed, the law with regard to pre-emption in the United Provinces was, until a few years ago, considered to be in such an uncertain condition that one could cite conflicting decisions upon nearly every single point which arose under the law of pre-emption. The gravity of the situation attracted the notice of the late Chief Justice Sir Henry Richards, who appointed a special Bench consisting of himself and Mr. Justice Tudball to dispose of that class of cases. The two Judges were in agreement with each other in regard to certain principles applicable to that class of cases and for several years together they used to sit together to dispose hundreds of these pre-emption cases. Both the Judges have now left the Court, but I understand two other Judges who hold more or less similar views now constitute the Bench to dispose of pre-emption cases. Then there is a considerable amount of litigation relating to the law of easements. In addition to this, there are ordinary suits under the Hindu Law raising questions of joint family, partition, father's debts, Stridhan (woman's estate), inheritance, adoption, Specific Relief Act, injunction, etc. Similar questions under the Mahomedan Law relating to divorce, dower, gifts, charitable endowments, very frequently arise in the United Provinces. Commercial litigation, too, is now springing up. With the development of certain industrial centres, one comes across not a few cases relating to partnership, accounts, wagering contracts or time bargains and negotiable instruments. Then there is the special class of cases which is peculiar to the United Provinces, Behar and Bengal, where there are great rivers. These are called alluvion and diluvion cases. I need not multiply further instances. I believe more or less the same may be predicated of other parts of India. But, there is one statement which I desire to make specially with reference to the Punjab and the United Provinces. In the Punjab particularly there is a vast amount of litigation relating to custom. Questions of custom, though not to the same extent, also arise in the United Provinces and elsewhere. In regard to certain communities, however, in the United Provinces, Behar and Bengal, and particularly in respect of big estates held by zamindars and taluqdars, very intricate questions of custom involving protracted investigation are raised. So far as Oudh is concerned, as I said in my former note, the curse of Oudh has been and is the Oudh Taluqdari Act I of 1869. It is an extremely obscure Act and practically every section of it has formed the subject of numberless decisions. A number of judicial officers in Oudh and a number of Their Lordships of the Privy Council have time and again referred to the obscurity of certain provisions of that Act.

3. The outstanding fact, however, of Indian litigation outside the Presidency towns and certain commercial centres, such as Rangoon, Karachi, Delhi and Cawnpore, is that most of the litigation relates to land. Litigation in respect of land may take several forms. It may involve the determination of the rights of the parties under their personal laws such

as the Hindu Law or the Mahomedan Law when issues relating to jointness or separateness of a family, or partition, or succession, or endowment, or adoption or alienation are raised ; or it may relate to certain transfers such as those effected by sale, leases, mortgage, gifts or wills. This being the case, it is quite clear that an Indian civil suit, though looking on the face of it very simple, may yet be a very complicated one and may raise issues of a most varied character.

Machinery.

4. The machinery provided by the Government for the disposal of this class of litigation consists of various grades of courts. To take a normal Governor's province for the sake of illustration. At the top is the High Court, below the High Court are District Judges ; then come Subordinate Judges, and last of all come the Munsiffs. This may be said to be true of Bengal, Assam, Behar, the United Provinces and Madras. In Bombay they have got no Munsiffs ; but instead of Munsiffs they divide their Subordinate Judges into first class and second class Subordinate Judges. In the Punjab, the system is now being more or less brought into line with the system prevailing in the United Provinces just referred to. I am not however entering into minute details about the various powers of the courts in the various Provinces ; but I shall take, as I have already said above, a normal Governor's Province to develop this point.

High Courts.

5. The High Court consists of a Chief Justice and a certain number of Judges. The Government of India Act provides [s. 101 (2)] that each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint. It lays down the qualifications of Judges. In order to be a Judge, you must be either a Barrister of five years' standing belonging to the English or the Irish bar, or an Advocate of five years' standing, belonging to the Faculty of Advocates of Scotland ; or a member of the Indian Civil Service, of not less than ten years' standing, and 'having for at least three years served as, or exercised the powers of, a district judge ; or a person having held judicial office not inferior to that of a subordinate judge of a small cause court, for a period of not less than five years ; or a person having been a pleader of a high court for a period of not less than ten years.' The Statute provides that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding the additional Judges, must be such barristers or advocates as aforesaid, and that not less than one-third must be members of the Indian Civil Service. In point of number the Calcutta High Court* has the largest number of Judges. There are—

*1 Chief Justice.
14 Judges.
1 Additional Judge.

Chief Justice.	Judges.	Additional Judges.	
1	6	*nil*	Judges in Bombay.
1	11	*nil*	„ Madras.
1	6	2	„ Allahabad.
1	6	2	„ Patna.
1	6	2	„ Lahore.

The jurisdiction of High Courts is laid down by their Letters Patent. The three Presidency High Courts, and the High Court at Rangoon, have got original jurisdiction. That is to say, they try original suits above a certain pecuniary value, the cause of action with regard to which ordinarily arise within the limits of the Presidency towns or the town of Rangoon. They have also appellate jurisdiction extending over the entire Presidency or the Province. The High Courts at Allahabad, Patna and Lahore have appellate jurisdiction, though each one of them also possesses extraordinary original jurisdiction. It is in regard to a certain class of suits that they exercise original jurisdiction (*e.g.*, suits of matrimonial character between persons governed by the Indian Divorce Act, or suits relating to probate and administration). The Bombay High Court, under a special Act, exercises jurisdiction over Parsi divorces, though it would be more accurate to say that the Judge who tries Parsi divorce cases sits as special Judge. The Presidency High Courts have also got admiralty jurisdiction, and I think that the Rangoon High Court, too, has got a similar jurisdiction.

Subordinate Civil Courts.

6. So far as the subordinate civil courts are concerned, they are under the control and superintendence of High Courts. Section 107 of the Government of India Act provides that each of the High Courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, this is to say :—

(*a*) call for returns ;

(*b*) direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction ;

(*c*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts ;

(*d*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts ; and

(*e*) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts ;

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any (law) for the time being in force, and shall require the previous approval, in the case of the High Court at Calcutta, of the Governor-General in Council, and in other cases, of the local Government.

The Letters Patent of these High Courts also give them power of superintendence. At Allahabad one Judge is usually in charge of administrative work connected with the supervision of subordinate courts, though I believe other Judges, too, occasionally inspect them. I understand that in some other courts there are committees of Judges, but I have no personal knowledge of the manner in which inspection is carried out by those courts.

The usual mode of disposing of cases in the High Court is as follows : A single Judge exercises jurisdiction, the pecuniary limit of which varies from High Court to High Court. In some High Courts,

for instance Allahabad, the pecuniary limit of the jurisdiction of a single Judge is Rs. 500. In some other courts I understand it goes as far as one thousand rupees. Under the Letters Patent, provision is made for an appeal to the court against the judgment of a single Judge. The word "judgment" in the Letters Patent has been the subject of a great deal of controversy. The Letters Patent appeals are heard either by a Bench of two Judges as in Allahabad, Patna or Lahore, or by three Judges elsewhere. This of course applies to cases disposed of by a single Judge in his appellate jurisdiction. In the Presidency High Courts appeals lie to the court from the judgment of single Judges on the original side. These appeals, I understand, are usually disposed of in Calcutta by a Bench consisting of three Judges. Similarly in the appellate High Courts where a Judge sits to dispose of a matrimonial or a probate suit, an appeal may lie to the court and it is disposed of by a Bench of two Judges. The rules of practice on this point vary from High Court to High Court.

District Judges.

7. District Judges are usually appointed from among the Indian Civil Service. I understand that the practice is that at an early stage of his career, a member of the Indian Civil Service makes up his mind as to whether he will continue in the Executive line or go to the Judicial line. It was the common belief at one time that the more promising and more ambitious among them used to prefer the Executive line. A certain number of District Judges are recruited by promotion from the Provincial Judicial Service. The number of such Judges varies from province to province. During the last few years in some provinces a few practising members of the Bar have been appointed directly to district judgeships.

As regards the work which these District Judges do, it must be borne in mind that they are also Sessions Judges and as such do a considerable amount of criminal sessions work and appellate work. It is very seldom that a District Judge tries an original civil suit. Such original work as he does is in the nature of disposing of applications under the Guardian and Wardship Acts for the appointment of guardians ; or the Succession Certificate Act for granting certificates for the recovery of debts due to the estate of a deceased person ; or under the Lunacy Act for appointing committees for lunatics ; or under the Insolvency Act for disposing of insolvency applications ; or under the Probate and Administration for granting probates and letters of administration. All this is in the nature of miscellaneous civil work, and it is to my mind by no means very heavy work. In addition to this, he disposes of suits relating to charitable endowments under section 92 which sometimes imposes heavy work or suits for the removal of trustees under Act XX, 1863 ; or cases under the Land Acquisition Act when there is a dispute with regard to the amount awarded by a Collector for compulsory purchase of land, or when there is a dispute as to the division of the money between rival claimants. Then the District Judge is supposed to do some appellate work. All appeals from Munsiff's decisions, in all classes of suits and civil proceedings lie, in the first instance, to the District Judge. All appeals from the decrees and orders of subordinate judges in civil suits and proceedings the value

of which exceeds Rs. 5,000 also lie in the first instance to the District Judge. A good many of the appeals from the Munsiff's judgments, where there is a heavy criminal work to be disposed of or where perhaps the District Judge does not like civil work, are transferred to subordinate judges or additional judges. Appeals from the subordinate judges, too, are not infrequently transferred to additional judges. I may note here that an additional judge has under the law the same powers as the district judge has, except that the latter has got the right of transferring cases from his court to the former. The District Judge is also in many provinces the District Registrar under the Registration Act.

Subordinate Judges.

8. Subordinate Judges in some provinces like the United Provinces, Bengal, Assam, Bihar, Madras and Bombay, are invariably men who were recruited originally as Munsiffs from among pleaders of certain standing. The rules of recruitment of the provincial judicial service are not uniform but the general feature is that a recruit must have taken a law degree or pass the Vakil's examination and practised for about two or three years. Only recently I understand the rule about practice has been dispensed with by the Allahabad High Court. In the Punjab I understand there is yet a very large number of subordinate civil officers such as Munsiffs and subordinate judges who do not possess any legal degrees and who do not belong to the legal profession. It is generally after 10 to 15 years of service as a Munsiff that an officer is appointed a subordinate judge, and when once he is appointed a subordinate judge his jurisdiction in the provinces of Bengal, Assam, Bihar, the United Provinces and Madras is unlimited. He can try suits of any value. The minimum value of a suit which should be filed before him is, ordinarily speaking, above Rs. 1,000. But in certain provinces Munsiffs either generally or by selection have powers to try suits up to the value of Rs. 2,000 or Rs. 3,000. Appeals from the subordinate judges decisions in suits and proceedings of the value of above Rs. 5,000 lie direct to the High Court both on facts and on law. Appeals for suits and proceedings valued up to Rs. 5,000 lie to District Judges.

Munsiffs.

9. The lowest grade judicial officer in Bengal, Assam, Bihar, United Provinces and Madras is the Munsiff whose pecuniary jurisdiction ordinarily extends up to Rs. 1,000 but in some provinces, as already pointed out above, the jurisdiction may go up to Rs. 3,000. I have already referred to the method of the appointment of these Munsiffs. Excepting perhaps the Punjab, they are invariably B.A., LL.B's or B.A., B.L's. In the foregoing paragraph I have traced the constitution and the powers of the various grades of courts in some principal provinces of India.

Quality of Judges.

10. As regards the quality of judicial officers in the provinces, the view that I have formed in my province and which I believe is shared by lawyers is that civilian district judges are quite competent to deal with questions of fact, though in many instances their knowledge of

law leaves much to be desired. On the other hand, it is only fair to say that I have come across some of the civilian district judges who have shown great competence in legal knowledge. As regards the subordinate judges, I think that, taking them as a whole, they are a very competent body of officers and certainly in Bengal, Bihar, Bombay, the United Provinces and Madras they have reached a high standard of efficiency. One difficulty about them is that they are so over-worked that they are not able to spare time to keep abreast of the growing literature of law. Another defect which I am bound to point out is that they are in many cases inclined to take a very technical view of things. This may be accounted for by two or three reasons. In the first place, it is a matter of common knowledge that in the subordinate courts in India, the tyranny of case law is supreme and not much discrimination is shown in the application of case law. In the second place, the average legal practitioner in the subordinate courts who has got to conduct and argue a case before the subordinate judge is himself a very technical person. He is not disposed to take a broad view of things and so far from relying on broad principles, he is disposed to take a very narrow view of facts and the law, and thus creates an atmosphere of narrowness about our judiciary. It seems to me that one of the baneful consequences of codification in India has been to subordinate the spirit to the letter of the law, and nowhere more than in matters of procedure one sees the manifestation of this spirit of narrowness. It is true that in some early decisions the Privy Council observed that the courts in India should constantly bear in mind that by their very constitution they were expected to decide according to equity and good conscience and that it was the substance and merits of the case and not the form which should always be borne in mind (see for instance VI, M. I. A. pp. 410-411.) But actual experience has convinced me that nowhere more than in the application of the principle of equity and good conscience, do our subordinate courts and the Mofussil Bar, fail. In one well-known case Lord Penzance (L. R. 4 Appeal Cases, p. 525) observed as follows :—

"Procedure is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating, it is permitted to obstruct and even to extinguish the legal rights, and is thus made to govern where it ought to subserve."

I am afraid these wholesome principles are very often forgotten : the result is not very creditable to the administration of justice in a certain class of cases. The same remarks apply more or less to the Munsiffs.

Probity of Provincial Judicial Service.

11. I have been assured by men, who know it, that the provincial judicial service in Bengal, Assam, Bihar and Madras is absolutely clean. There have unfortunately been some cases of corruption in the United Provinces but Sir Grimwood Mears, the Chief Justice, has taken strong action, which has brought about the dismissal of some of the judicial officers. As regards the Punjab I have no direct knowledge, but I am bound to say that I have not heard very creditable accounts of the subordinate judiciary in the Punjab.

Procedure.

12. Our law of procedure is contained in the Code of Civil Procedure, which was passed in 1908. The first attempt at codification was made in 1859 when a rudimentary Civil Procedure Code was passed. The second attempt was made in 1877 ; and the third attempt was made in 1882. The present Code is modelled more or less on the English procedure. There are 158 sections in the Code itself and there are schedules attached to it containing various orders and rules. One of the leading features of the new Code is that it provides that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of a court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. This, to my mind, is a very salutary section and if used properly and with discretion should enable subordinate courts to put down many of the abuses of the process of the court for which there is no express provision elsewhere in the Code. I have, however, found much reluctance on the part of courts to make use of this power. It may be due to the fact—and that has been put to me by some subordinate judges —that they do not feel sure whether the exercise of this power by them under this section would be supported by High Courts. I am myself inclined to think that by habit and training they have been so much accustomed to follow the letter of the law that they feel either nervous or unwilling to take any strong action, with a view to put down abuse of the process of the court. Another important feature of the present Code is that Part X of the Code of Civil Procedure gives the High Court power to make rules regulating their own procedure and the procedure of civil courts subject to their superintendence and also the power to annul, alter or add to all or any of the rules in the first schedule (*vide* section 122) There is provision for a rule committee and section 128 tabulates the matters for which provision may be made by rules. High Courts had laid down rules for the guidance of subordinate courts even before the present Act came into force, but I am bound to point out that many of those rules related to matters of detail more or less of an administrative character. I have noticed some reluctance on the part of High Courts to take full advantage of the power which this part of the Code of Civil Procedure gives to them. I personally think that a good deal of the abuse of the present system of work in the subordinate courts could be effectively checked if we could persuade the High Courts to avail themselves of the power given to them under this chapter. I may point out that only last year it was brought to my notice that no rule committee had been appointed by the Calcutta High Court although the Act has been in existence for so many years.

Some of the Abuses.

13. The very first abuse to which I shall invite attention is the extraordinary delay which takes place in the service of process. Service is effected through process servers who are peons getting very small and paltry salaries, and it is notorious that you cannot get a process served without bribing the subordinate staff and the process server. It is equally notorious that if the person on whom the process has to be served wants to avoid or evade the service of process, he can do so easily by bribing the process server and getting him to give a false return. A considerable amount of delay no doubt takes place also because of transport difficulties

in the interior. The territorial jurisdiction of the Civil Courts are in some provinces, and particularly in some districts, very large, and it is not always very easy, even with the most honest process serving staff, to get processes served with promptitude. I have heard it suggested that courts of law should make greater use of the postal service. How far this can be effected is a question which must be examined in conjunction with the postal authorities. Again, it must be borne in mind that the array of parties to suits in India is very often amazingly large. So many interests are involved and so many transfers take place with regard to the same property that very often we find a very large number of defendants impleaded to suits. When I left the profession, I had a case pending in which over 1,200 persons were defendants and it was extremely difficult to get on to a hearing because of the difficulties which arose with regard to service on the original defendants or the representatives of those who died after the institution of the suit. We have got in the Code of Civil Procedure a rule to the following effect (O. I. r. 8) :—

"Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct."

The expression "'same interest" has formed the subject of many judicial decisions. In a decision in England in the case of *Duke of Bedford *versus* Ellis, Lord MacNaughten is reported to have observed as follows :—

*(1901) Appeal Cases, p. 1 at page 8.

"Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the complaint proposed to represent."

The Madras High Court have recently held that the disciples of a Mutt have sufficient interest within the meaning of this rule to maintain a representative suit, to declare an alienation made by the Mahant invalid and have the property alienated handed over to the Mahant (I. L. R. 41 Mad. 124). This, however, will apply only to suits in which there is multiplicity of plaintiffs, but I do not think that it is easy enough to deal with cases where there is multiplicity of defendants. One very common class of cases in India is where a qualified owner such as a Hindu widow makes alienation of different fractions of the same property to a number of persons who in their turn transfer the same property to various other persons, and a suit is brought by a reversioner on the death of the widow, to set aside those alienations. It is, to my mind, difficult to say, having regard to the doctrine of legal necessity that the interest of one defendant is necessarily the same as that of the other defendants. I have mentioned this only to show that in my opinion the law requires to be revised, and there seems to me to be some necessity for making provision for extending the scope of representative suits, subject to certain safeguards in our Code.

14. Another serious difficulty which is responsible for unnecessary waste of time, especially in subordinate courts, is that, in spite of the fact that an educated Bar has now come into existence and the Code of Civil

Procedure now makes special provision for precision and definiteness in pleadings, courts of law are generally too indulgent in the matter of pleadings. In the early days of British rule the Privy Council observed in a number of cases that pleadings should not be strictly construed in India. I think there was good reason for that, because at that time a trained Bar did not exist in the Mofussil ; but that reason has ceased to exist, and I see no reason why stress should not be laid by courts of law upon pleadings being drawn up with precision and accuracy, and why parties should be allowed to travel beyond their pleadings during the trial.

15. Apart from this difficulty about pleadings, there is another omission of which the subordinate courts in the province of Agra, with which I am familiar are almost invariably guilty. They very seldom follow the Code of Civil Procedure in the matter of the opening of a case. They have inherited the notion from olden times that it is a waste of time to have a case opened by Counsel. The result of this is that it is very seldom that one comes across a trial Judge, who during the trial of the case knows precisely what the points at issue are and who can give decision on the spot as to whether a particular evidence sought to be introduced in the case is or is not relevant. I have come across a number of subordinate judges who are in the habit of disposing of questions of relevancy or admissibility raised during the trial by the convenient formula " admitted subject to objections at the hearing ". On various occasions strong objection has been taken by the High Court to this slovenly practice ; but I am afraid it has had little effect. Indeed matters have come to such a pass that documentary evidence which is produced by the parties in the case is sometimes ' exhibited ' after the oral evidence is over and after parties have argued out their case. If subordinate judges are unable to put down this irregularity on the part of pleaders who ordinarily practise before them, I am afraid they are equally unable to deal with senior Counsel who in big cases are taken down before them from the High Court. Another important feature of Indian litigation which requires to be carefully borne in mind is the inveterate habit of litigants and pleaders to seek adjournments. In some cases undoubtedly adjournments may be justified but in the vast majority of cases an application for an adjournment is made in order to gain time. The usual grounds on which an adjournment is applied for is that summonses have not been served on certain witnesses or that some commissions issued by the court for the examination of certain witnesses outside the jurisdiction of the court have not been returned. Some subordinate judges no doubt show strength in dealing with such applications for adjournments, but I should think a good many of them are a little too indulgent. I think our law requires to be stiffened in respect of this matter and there should be a clear provision that within a certain time which may be necessary for the preparation of the case, the parties must get ready and when once the case is put on board, it should not be adjourned except for very strong and cogent reasons and the trial should proceed *de die in diem* until it is closed.

16. As I pointed out in my previous note a great deal of delay takes place when accounts are referred to a commissioner. In many commercial and mortgage transactions in the country and also in many suits relating to land (*e.g.*, relating to the partition of a joint family estate or adoption) the best evidence is furnished by written accounts. There is nothing more common than the tendering of a large number of books in such cases,

I think this lends itself very easily to gross abuses. This part of our law seems to me also to require revision.

17. I also suggested in my former note that it is also a question for consideration whether the provisions of o. 37 of the Code of Civil Procedure, which prescribe summary procedure for cases relating to negotiable instruments more or less in accordance with English practice, should not be extended to subordinate courts. As the law stands at present it applies only to the High Courts of Calcutta, Madras and Bombay, to the Chief Court of Lower Burma and the court of the Judicial Commissioner of Sind. I think the time has come when it should be extended to important towns in every province. For instance in the United Provinces I would extend o. 37 to places like Cawnpore, Aligarh, Benares, Lucknow, Meerut and Moradabad. And here I may point out that in certain parts of India, where at one time commercial cases were practically unknown, a good deal of commercial litigation is springing up. In the United Provinces in my own time commercial litigation in certain centres had considerably increased. I consider it is unfortunate that these cases should be tried by subordinate judges who have had no training in commercial law. The result is that these cases are tried with the elaboration with which land suits are tried. It will probably be for local Governments to consider whether they should not employ trained commercial judges at such centres I think if local Governments could be persuaded to send one or two subordinate judges on deputation to England for a short time to watch the practice and procedure of commercial courts, they should be able to deal with this class of litigation better.

18. I have very often heard it said that our Indian Code is far too indulgent in the matter of appeals and that cases are prolonged by reason of appeals filed from interlocutory orders, not with the object of getting a decision of any interlocutory order which matters but with the object of indirectly securing the postponement of the trial of the case. I confess that I have come across this sort of abuse. On the other hand, it seems to me that any drastic changes in the matter of appeals in this country are bound to provoke a great deal of resentment. When there is a first appeal filed, it is open to the appellant to challenge the findings of the court from whose decision the appeal is filed both on facts and on law. But it is not so in the case of second appeals. A second appeal can only lie on the grounds mentioned in section 100 of the Code of Civil Procedure ; (1) that the decision of the court below is contrary to law or to some usage having the force of law ; (2) that the decision has failed to determine some material issue of law or usage having the force of law ; and (3) that a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits. I cannot say that the High Courts are very indulgent in the matter of admission of second appeals. At the same times it seems to me that in some courts not much responsibility is laid upon counsel or pleaders filing such appeals. I believe the Calcutta High Court require a certificate from the pleader filing an appeal that the point which he has raised in the case does genuinely arise in it. That is not the practice in Allahabad. I think some such practice should be uniformly adopted. I confess that I am not in favour of a certificate being granted by the subordinate courts for the purposes

of an appeal. It is also a question for consideration as to whether the right of appeal in regard to certain orders (and I use the word " orders " in the sense in which it is used in India) should not be refused. In this connection I would draw particular attention to section 104 and o. 43 r. 1 of the Code of Civil Procedure. It is possible that upon a careful examination of these two provisions it may seem necessary to cut down a few clauses and substitute a few others for the purposes of an appeal I do not think that it is necessary for me in this note to go into those details.

19. I have hitherto refrained from taking up two big questions which relate to the execution of decrees ; and to local, tribal or family customs. I shall first take up the Execution of Decrees. So far as our law relating to execution of decrees is concerned, it is contained in o. 21 of the Code of Civil Procedure. It consists of 103 rules. Decrees in India for the purposes of execution may roughly be said to be divided into the following classes :—

(1) money decrees,

(2) mortgage decrees,

(3) partitions decrees,

(4) declaratory decrees,

(5) decrees for specific performance,

(6) mandatory decrees, for instance, decrees which require something to be done or not to be done.

(7) decrees requiring personal obedience.

20. I do not think that this is an exhaustive description of decrees. It is specially when a decree has to be executed against certain immoveable property that trouble arises. Here, it must be borne in mind that there is no such thing as registration of title in this country. So far as zamindari property is concerned, there are certain entries in the revenue papers but these entries are only *prima facie* evidence of the title and they are always open to challenge ; nor is there always any certainty about the extent or the boundaries of every property. The system is further complicated in the case of Hindus by the law relating to joint Hindu family. The fact that a certain person's name happens to stand against a certain property in the revenue papers, does not preclude the possibility of there being other co-proprietors who are joint with him. The name of a person may be regarded in revenue papers as the head or manager of a joint family without any description to that effect, and if the decree happens to be only against that particular individual and the decree-holder seeks to attach that property the other co-partners then challenge the validiy of that decree on various grounds open to them under the Hindu law. Similarly, it very frequently happens that the name of a Hindu widow is entered in the revenue papers, and when a decree-holder seeks to execute the decree against that property, other people come forward and urge that the widow's name was entered only for what is technically known as consolation. I could illustrate the same sort of difficulty with reference to Mohammadan law. I am not overlooking the element of corruption which prevails more or less among the subordinate staff who are in charge of the execution of decrees. Even though we might take some steps to eliminate that

element, it seems to me that the whole system of execution of decrees is so closely bound up with the personal laws of Hindus and Mahomedans that unless some strong steps are taken to remedy some of the outstanding defects of those laws, I think a mere revision of this chapter will not lead to any abiding results.

21. In regard to matters of procedure connected with the execution of decrees, I would particularly draw attention to a few matters which seem to me to call for consideration. It seems to me that the third party procedure calls for some simplification. Objections are filed by the third party under o. 21 r. 58 and the decision on these objections is almost invariably followed by a regular suit. This seems to me to require some consideration. Then again a greater degree of precision should be insisted upon in regard to the contents of proclamations issued for the sale. For, it seems to me that a large number of applications which are filed in civil courts to set aside sales, held in the execution of decrees are based on the ground of irregularity or illegality, and they might be stopped if more care was taken at the initial stages. This would entail an examination of r. 64, 72, 82, 83 to r. 93.

The system of granting certificates to purchasers also calls for revision. A great deal of trouble arises from the slovenly manner in which sale certificates are drawn up and questions are frequently raised as to the extent of transfer effected by a sale certificate.

22. The one outstanding feature of the law of execution in India is the leisurely manner in which a decree may be executed. Article 182 of the Law of Limitation provides for the execution of a decree or order of a civil court ; the period of limitation prescribed for the execution of a simple decree is three years or where a certified copy or decree has been registered, six years. I confess that this looks very simple, but when the third column of the schedule is borne in mind, then it will appear what a complicated system we have provided. For the sake of His Excellency's convenience, I shall quote the whole of this below :—

182. For the execution of a decree or order of any Civil Court provided for by Article 183 or by section 48 of the Code of Civil Procedure, 1908.	Three years ; or where a certified copy of the decree or order has been registered, six years	1. The date of the decree order, or 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, 3. (where there has been a review of judgment) the date of the decision passed on the review, or 4. (where the decree has been amended) the date of amendment, or 5. (where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper court for execution, or to take some step in aid of execution, of the decree or order, or

6. (where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such notice is required by the Code of Civil Procedure, 1908, or

7. (where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date.

Explanation I.—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 5 of this article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives shall take effect against them all

Explanation II.—"Proper Court" means the court whose duty it is to execute the decree or order.

23. It will probably interest His Excellency to know that on this seemingly inocuous provision the rulings of the various High Courts as summarised in the latest edition of Rustomji's Law of Limitation covers something like 75 closely printed pages. I have always felt that these provisions are a standing temptation to dishonest decree-holders and dishonest judgment-debtors to trouble, annoy and cheat each other and to prolong execution at their will and pleasure by taking shelter behind a thousand

and one pleas which legal technicalities can raise. To discuss each one of the clauses separately seems to me to be out of question in this note. But what I would urge is that we should make a clean sweep of all these stages and definitely fix a time limit within which a decree must be executed, making provision only for extension of time in the discretion of the Judge when it is established to his satisfaction that the execution of a decree could not be had owing to the fraud of the judgment-debtor or the negligence of the executing staff.

24. In order to put down obstruction on the part of obstinate and dishonest judgment-debtors perhaps it may be necessary for us to devise some effective system of equitable execution by taking over the property in the custody of the court by the appointment of a receiver or some other officer charged with the duty of administering the judgment-debtor's estate and satisfying the claims of the decree-holder. No doubt, there are provisions for the appointment of receivers in the Code of Civil Procedure ; but it seems to me that there is room for their revision and the extension of their scope. These are purely tentative suggestions which I have made and which I have no doubt will be carefully considered and examined later on.

25. I may here state that so far as partition decrees relating to zamindari property is concerned the actual partition is effected not by the civil courts but by the revenue courts. This is probably due to the fact that the revenue courts have more direct and intimate knowledge of the zamindari property and they can also more effectively safeguard interest, of the Government in regard to the collection of revenues. This procedure involves considerable delay.

26. I have referred above to the difficulty which arises in Indian litigation by reason of our customary law. These mostly arise in cases of inheritance or succession or adoption under the Hindu Law. For instance, in some cases of succession it is pleaded that daughters are excluded by custom from inheritance. In others, it is pleaded that the estate in question is by custom heritable by the rule primogeniture. The latter class of custom is very frequently set up in Oudh, Bihar and Bengal. It is in this class of cases that not only a mass of documentary evidence is tendered but a very large number of witnesses over a large area, some times over several provinces, are examined on commission. These cases take an extraordinarily long time. I understand that an attempt was made some years ago in the Punjab to codify the law relating to custom. Great difficulties were then felt in achieving satisfactory results, but it seems to me that the position in the Punjab is very peculiar. There we have got to deal with small agricultural communities and both Hindus and Mahomedans are affected by their local tribal customs. The task however of legislation in provinces like Bengal, Bihar, the United Provinces and Madras should not be so difficult or so stupendous. I have in view big zamindaris and taluqdari which very frequently form the subject of litigation in various provinces. It should not, to my mind, be difficult to make an investigation about the titles of these big estates and the rule of custom applicable to them and then to introduce legislation in the provincial councils. This of course is a matter for provincial government. Legislation of this kind has for long been suggested in some of the provinces but no serious attempt has so far been made. I believe Sir Bhashyam Aiyar, one of the foremost lawyers and judges of his day, was responsible for a Bill relating

to impartible estates in Madras. Perhaps the better course would be to suggest to the local Governments to appoint committees to explore the possibilities of such a legislation with regard to big estates within their jurisdiction.

27. I shall now summarise the suggestions that I have to submit on the whole question :

(1) In my opinion, it is necessary that the inspection of the subordinate courts by the High Court should be carried on more vigorously and more regularly. This may in some High Courts involve the appointment of additional judges, but in my opinion the appointment of one additional judge to each High Court, whose business it will be to be constantly inspecting the working of the subordinate courts, will not be a waste of money.

(2) We must seek the co-operation of the High Courts and invite their attention to the desirability of using their powers under the Code of Civil Procedure for revising their rules for the guidance of the subordinate courts, with a view to putting down the abuse of legal process.

(3) In my opinion, the Code of Civil Procedure and the Law of Limitation should be carefully revised so as to secure expedition of work and the putting down of frivolous litigation and obstructive and dilatory proceedings.

(4) It is of the utmost importance that we should insist on a higher standard of probity among the subordinate staff attached to the courts, particularly those who are charged with the execution of decrees. In my opinion, the subordinate staff is not adequately paid and there are temptations in their way to which they easily succumb. This will no doubt involve the local Governments in further expenditure, but I think it is inevitable if we desire to secure efficiency, honesty and expedition.

(5) So far as commercial cases are concerned, I think we must strengthen the commercial courts by appointing trained judges and we must also simplify the procedure for the trial of commercial cases. As regards the training of these judges, in the mofussil, I would suggest that the experiment of sending a few selected subordinate judges or district judges to England for receiving their training in commercial law and practice, should be commended, to the notice of local Governments.

(6) It should be seriously considered (and I referred to this in my previous note) as to whether we should not pass legislation against champerty. In India we have too long allowed the law as laid down by the Privy Council in different conditions to obtain among the people of this country who have more or less, outgrown those conditions.

(7) We must explore the possibility either of securing more satisfactory entries in revenue papers or stiffening our law of evidence as to the presumption arising from such entries.

(8) I think it would be necessary to stiffen our law of registration also. There is not to my mind, sufficient solemnity attached to a registered instrument in India and parties may go easily behind registered instruments.

(9) Legislation with regard to dishonest pleas which are open to parties under the Hindu or the Mahomedan law might well be taken in hand. This will no doubt provoke criticism about interference with the

personal laws of the Hindus and Mahomedans, but I think that upon a dispassionate view, it will be found that it does not involve any interference with religion at all. In this connection I would suggest the desirability of considering whether we should not have legislation in this country on the lines of the English Vexatious Suits Act.

(10) In regard to big estates, I feel very strongly that the time has come when provincial Governments should be invited to undertake legislation on the lines suggested above.

These are some of the suggestions which occur to me. In order to examine them, I think it may be necessary to appoint a strong representative commission. Should His Excellency feel disposed to do so, I would suggest that it would be extremely helpful to have on the Commission either a judge from England or a master from the supreme court there. I presume that there would be some judges from the Indian High Courts also on the commission. I would, however, venture to suggest that in order to secure effective representation of local knowledge and the conditions of work prevailing in the mofussil, it would be extremely useful to have one district judge, one or two subordinate judges, one or two pleaders practising in the subordinate courts, and some of the leading practitioners selected from the various High Courts. I would also have a Revenue officer who has had experience of settlement work. I anticipate that the area of enquiry covered by this commission will be very large and that it will possibly take 18 months if not more to finish this work. This will undoubtedly involve heavy expenditure, but I do believe that if a strong and representative commission, such as suggested above, is appointed, we may have a report of an extremely useful character which may facilitate the task of the Government in taking action, legislative or otherwise, upon that report.

27. In conclusion, I may add that there was a commission appointed so far back as 1853 to examine the recommendations of the Indian Law Commissioners and the enactments proposed by them for the reform of the judicial establishments, judicial and Law of India. The commission consisted of some eminent English lawyers like Sir John Romily, Master of the Rolls, Sir John Jervis, Chief Justice of Common Pleas, Mr. Charles Cameron, Mr. Macleod, Mr. Robert Lowe and others. As a result of their reports, the Supreme Courts and the Company's Courts were amalgamated into the present High Courts and the Code of Civil Procedure and Criminal Procedure were in later years passed. I have looked into these reports but I cannot say that I have found anything in them which would help the present situation.

No. 77.

Amendment of the Indian Copyright Act, 1914, so as to enable the protection given by it being extended to Indian States.

(8th December, 1922).

In an earlier file (Home Department Proceedings A., Books and publications, January 1902, Nos. 37-39) on the record of this case I have come across a note by Mr. Greeven, dated the 4th November 1901, in which he stated that "so far as reciprocity with independent States is concerned, the matter can always be settled by means of an Order in Council under the International Copyright Act of 1886, provided that the States in question either have or adopted laws affording protection similar to our own. The securing of such agreement does not appear, subject to the advice of the Foreign Office, to be inappropriate to the functions of a paramount power in relation to States deprived by it of international existence".

(Legislative Department, unofficial No. 376 of 1923).

2. In 1920, Mr. Wright of this Department expressed the opinion [*cf.*, B., Copyright, October 1920, Nos. 1-5 File A., 183 (1)] that "though subjects of Indian States are protected persons in Foreign States, and are referred to as such in section 15 of the Foreign Jurisdiction Act, 1890, the States in India are not protectorates". Sir George Lowndes endorsed the opinion of Mr. Duval that section 28 of the Copyright Act, 1911, which had been extended to India by the Indian Copyright Act III of 1914, could not empower His Majesty to extend the Act to Indian States, such Indian States having their own power of legislation; but that if an Indian State made Copyright Act of its own, or undertook to make such provisions as would procure copyright in British and Indian works being recognised in such States, an Order in Council could issue under section 29 of the Act, recognising the copyright of the works produced in Indian States.

3. In his note of the 2nd December 1922, Mr. Graham is of opinion that the time has come to reconsider the position and that the correct decision is that while there is no objection to the States legislating in respect of copyright within their States, legislation which is to provide for the recognition of copyright of Kashmir State abroad and in the British Empire apart from British India, must be enacted for the Kashmir State by an Order in Council under section 28 of the Copyright Act of 1911. The basis of this opinion seems to be that Indian States are not Sovereign excepting in a very limited sense and that they are not free to enter into foreign relations or conventions with foreign States, and also that they are indeed territories under the protection of His Majesty within the meaning of section 28 of the English Copyright Act of 1911. As against the application of section 28, it may be urged that, having regard to the marginal note which uses the word "protectorates", Indian States are not protectorates. I agree with Mr. Graham that in construing the section we must look to the plain language of it and cannot allow the marginal note to over-ride this plain construction. Section 28 gives power to His Majesty to extend by an Order in Council the Copyright Act of 1911 to any territories under his protection, and to Cyprus. Personally I think that it would be putting a narrow interpretation on the words "under his protection" to

hold that they necessarily imply that those territories must be protectorates in the technical sense of the word. Having regard to the political relations that prevail between the Crown and the Indian States, it seems to me that it would be difficult to hold that the territories of Indian princes are not territories under the protection of His Majesty. Does this construction militate against the claim of Sovereignty on the part of Indian States ? To answer this question, we must put the further question. Are the Indian States sovereign ; if so, in what sense ? Native States are subject to the suzerainty of Great Britain but they are debarred from all external relations. Even in their relations with the British Government they are declared not to be subject to the ordinary rules of international law. Nevertheless, for other purposes, and within the domain of private international law, these States are to be regarded as separate political societies and as possessing an independent civil, criminal and fiscal jurisdiction. (Cf. the case of Sirdar Gurdyal Singh versus Rajah of Faridkote, 1894 A. C. 670). Lord Birkenhead in his International Law however, says " To describe as protectorates the Native States of the Indian Empire seems to be a misuse of the term. In theory independent, these States are in fact subject to the ultimate jurisdiction on the part of the British Crown, and are for all practical purposes part of the British Empire and therefore not within the purview of international law ". On the other hand, Hall in his International Law at page 27 speaks of them as protected States. I shall quote his very words, " Protected States such as those included in the Indian Empire of Great Britain are not subjects of international law. Indian native States are theoretically in possession of sovereignty, and their relations to the British Empire are in all cases more or less defined by treaty ; but in matters not provided for by treaty, a residuary jurisdiction on the part of the Imperial Government is considered to exist, and the treaties themselves are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved, or even when the interests of the subjects of the native princes are gravely affected. The treaties really amount to a little more than statements of limitations which the Imperial Government, except in very exceptional circumstances, places on its own action. No doubt this was not the original intention of many of the treaties, but the conditions of English sovereignty in India have greatly changed since they were concluded and the modifications of their effect which the changed conditions have rendered necessary are thoroughly well understood and acknowledged ". Lee-Warner in his book on " The Protected Princes of India " discuss this question at length with reference to certain authorities on international law and says that it has become a commonplace that the protected States of India lie beyond the scope of a treatise upon international law, (see page 376). It seems to me that though in regard to international matters Indian States might claim sovereign rights, such a claim could only be accepted subject to certain very important qualifications, and if we were only to bear in mind the accepted meaning of the word " sovereign " in the Austinian sense of the term, I think it would be difficult to sustain such a claim. One writer may hold that they are not protectorates within the meaning of the word as it is generally used. Another writer like Hall may say that these protected States are not subject to international law. There however seems to be a clear unanimity among the writers that whatever be the

exact position of the Indian States, they are not subjects of international law in their relation to foreign powers. If these States claim a right to pass a copyright law, then it must also be assumed that they claim the right to execute convention with foreign powers. Indeed such a right has been put forward in the Kashmir law. But it seems to me that such a right would wholly be subversive of the political relation that prevails between the British Government and these States.

4. The view that I am expressing now is practically the same as I expressed so far back as the 22nd of June 1922, in the file relating to the Fugitive Offenders Act. I stated there as follows :—" So far as I am aware from the time of Austin downwards no Jurist (from a strictly legal point of view) has ever conceded that Indian States possess Sovereign rights within the meaning of that expression as it is understood in law. They may have, and many of them probably have, plenary power inside their own territories, but that alone is not sufficient to make them Sovereign powers. They cannot enter into foreign relations directly ; they cannot make peace or war, and in point of fact they accept the suzerainty of the British Crown. This being the position, I think that Parliament could legislate for them for certain purposes ". Towards the end of that paragraph (8), I referred to the Copyright Act of 1911 as an instance in point.

5. I think there is a great deal of force in the observation of Mr. Graham that the words " any place or group of places over which His Majesty extends his protection " to be found in the Fugitive Offenders (Protected States) Act, 1915, can in substance be scarcely distinguished from the corresponding words in the Copyright Act of 1911. I therefore agree with the conclusions which Mr. Graham has arrived at, *i.e.*, that " the regulation of the relations of the Indian States *inter se* in the matter of Copyright may be effected by executive orders of the paramount power as has been done in the matter of extradition between the States *inter se* ; but the regulation of the relations of the Indian States with foreign countries and with parts of the British Empire, other than British India, can only be effected by an Order in Council under Section 28 of the Copyright Act of 1911 ".

No. 78.

Proposed amendment of Section 109 of the Criminal Procedure Code, 1898.

(*28th December, 1922.*)

(Legislative Department unofficial No. 1013 of 1922).

I confess that apart from the rulings of the High Courts to which reference has been made in the notes, Section 109 of the Code of Criminal Procedure does not seem to me to present any very great difficulty. So far as clause (*a*) is concerned the mere taking of precautions by any person to conceal his presence within the local limits of such magistrate's jurisdiction will not bring him within the purview of Section 109. What is also necessary to prove is that when he is taking such precautions to conceal his presence there must be reason to believe that such person is taking those precautions with a view to committing any offence. If there is reason to believe that his attempt at concealment has anything to do with his intention to commit an offence then I think he can be proceeded against under Section 109 (*a*). So far as the case of Satish Chandar Sircar, *versus* Emperor (Indian Law Report, 39, Cal., page 456) lays down the proposition that the concealment referred to in Section 109 of the Code of Criminal Procedure must be with a view to committing some offence, I think the judgment must be accepted as sound. That was a case in which one Satish Chandar was concealing himself in order to avoid observation and there was reason to believe that he was connected with an anarchist agitation and conspiracy to commit dacoities and other crimes. He returned to his father's house on the 9th August 1911, and merely secluded himself in the daytime going out at night for exercise. Mr. Justice Holmwood and Mr. Justice Sharfuddin have in their judgment said that the prosecution has not made out that the accused was taking any particular steps to conceal himself for the purpose of committing any offence. This is a question of fact and they were entitled upon the evidence before them to come to that conclusion. They, however, further said that the fact that the accused had previously been connected with any criminal conspiracy or might still be in correspondence with any criminals would not be relevant in a case under Section 109. It is with this part of the judgment that I find it difficult to agree. In my opinion such evidence would be relevant under Section 109 though the weight to be attached to it would depend upon the facts of each case. It might be that in any particular case the evidence of the accused's connection with anarchists or with criminal conspirators might not be sufficient to lead to the inference that his attempt at concealing himself had anything to do with an intention to commit an offence. It is also by no means inconceivable that his attempt at concealment had proceeded from his intention to commit an offence.

2. The real difficulty is with regard to the interpretation of the words "who cannot give a satisfactory account of himself" in clause (*b*) of Section 109. Mr. Justice Chamier held in the case of Sharif Ahmed, *versus* King-Emperor reported in (8 A.L.J.R., page 1097), that these words did not mean that the accused was bound to satisfy the magistrate that he spent his time or at least his leisure hours in a satisfactory manner. That was a case of an octroi chaprasi who was arrested with certin others on the ground that they were habitual thieves and robbers and

were taking precautions to conceal themselves within the limits of the magistrate's jurisdiction. I have read the judgment of Mr. Justice Chamier and the report of the case in the Allahabad Law Journal. It does not appear clearly from the report whether action was initiated against the accused under clause (*a*) though I gather from the opening portion of the judgment that probably this was the case. Anyhow it is clear from the judgment that the magistrate passed an order against the accused to furnish security because he could not " give a satisfactory account of himself " within the meaning of clause (*b*) of section 109 although his place of residence and occupation were well-known. I think on the facts of the case the judgment was perfectly sound.

3. As regards the case of Rashu Kaviraj, *versus* King-Emepror (22, Calcutta Weekly Notes, page 163) the accused in that case was by profession a Kaviraj and dealer in cocoons. He was found at about midnight in a lane in association with two others who had in their possession house breaking implements and on being discovered he fled. When he was arrested he remained silent and the explanation which he subsequently offered to the magistrate of his presence at the time and place in question was false. It was held by Mr. Justice Teunon that the facts found did not bring the accused within either clause of Section 109 of the Code. Mr. Justice Shamsul Huda, held that clause (*a*) of Section 109 of the Code of Criminal Procedure, referred to a " continuous act " and, therefore, did not apply to the case before him in which there was a momentary effort on the part of the accused at concealment to avoid detention or arrest. I confess that I am not satisfied with this decision at all. What Mr. Justice Shamsul Huda precisely meant by " continuous act." I cannot understand, and it seems to me with all respect to the learned Judge that he was reading some words into the section which do not exist there. I for mysef would not put such a narrow interpretation upon clause (*a*) of Section 109. I can quite conceive of a man harbouring an intention to commit a criminal offence at a particular place and at a particular moment and with that intention taking steps to conceal his presence within the limits of such magistrate's jurisdiction. I do not see any reason why such a person should not be dealt with under clause (*a*).

As regards clause (*b*), I think it is difficult to treat this decision as an authoritative decision on the interpretation of that clause. Mr. Justice Shamsul Huda is absolutely silent with regard to clause (*b*). Mr. Justice Teunon scarcely makes any attempt at analysing or interpreting clause (*b*),

4. So far as the words " cannot give a satisfactory account of himself " are concerned they also occur in Section 55 (*b*) of the Code of Crminal Procedure. While no doubt it is true as pointed out by Mr. Justice Chamier in the case of Sharif Ahmed, *versus* King-Emperor (8 A.L.J.R., page 1097), that an accused person cannot be called upon to satisfy the magistrate that he spends his time or at least his leisure time in a satisfactory manner, I think that if an accused person who conceals himself within the limits of a magistrate's jurisdiction under suspicious circumstances or is a man with a criminal history behind him and is unable to satisfy the magistrate that he is there for some legitimate purpose he would be liable to action under this clause. I do not think that it is possible to place an interpretation on these words which would cover all cases. It seems to me that much will depend upon the facts of each case.

Personally speaking I do not think there is much room for finding fault with the phraseology of the law. As regards the decision in Rashu Kaviraj, *versus* King-Emperor (22, Calcutta Weekly Notes, page 163), I think that it is not at all satisfactory, and I should be reluctant to treat it as an authoritative decision. It seems to me that if it has led to administrative difficulties an attempt should be made in the High Court itself to get this point referred to a larger bench. It does not seem to me, however, that there is a strong case made out by the Bengal Government for any amendment of Section 109. I would leave that section and other similar sections in the Code untouched at any rate for the present.

L149LD—40—8-3-26—GIPS

INDEX

TO

NOTES AND MINUTES BY THE HONOURABLE SIR TEJ BAHADUR SAPRU, K.C.S.I.

(References are to pages.)

M/14LD—10—9·3·21—GIPS